CANADIAN THESES ON MICROFICHE

I.S.B.N.

THESES CANADIENNES SUR MICROFICHE

National Library of Canada
Collections Development Branch

Canadian Theses on
Microfiche Service

Ottawa, Canada
K1A 0N4

Bibliothèque nationale du Canada
Direction du développement des collections

Service des thèses canadiennes
sur microfiche

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us a poor photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30. Please read the authorization forms which accompany this thesis.

THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de mauvaise qualité.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30. Veuillez prendre connaissance des formules d'autorisation qui accompagnent cette thèse.

LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE

NL-339 (r. 82/08)

Canada

92

0-315-16001-2

National Library of Canada | Bibliothèque nationale du Canada

Canadian Theses Division | Division des thèses canadiennes

Ottawa, Canada
K1A 0N4

63910

PERMISSION TO MICROFILM — AUTORISATION DE MICROFILMER

• Please print or type — Écrire en lettres moulées ou dactylographier

Full Name of Author — Nom complet de l'auteur

Donald John Manderscheid

Date of Birth — Date de naissance

November 19, 1949

Country of Birth — Lieu de naissance

Canada.

Permanent Address — Résidence fixe

8740 -165 Street

EDMONTON, Alberta.
T5R 2R8

Title of Thesis — Titre de la thèse

Some Problems with the Condominium Law In Alberta.

University — Université

University of Alberta.

Degree for which thesis was presented — Grade pour lequel cette thèse fut présentée

MASTER OF LAWS (LL.M.)

Year this degree conferred — Année d'obtention de ce grade

1983

Name of Supervisor — Nom du directeur de thèse

Ronald G. Hopp

Permission is hereby granted to the NATIONAL LIBRARY OF CANADA to microfilm this thesis and to lend or sell copies of the film.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

L'autorisation est, par la présente, accordée à la BIBLIOTHÈQUE NATIONALE DU CANADA de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans l'autorisation écrite de l'auteur.

Date

April 14, 1983

Signature

Don J Manderscheid

NL-91 (4/77)

THE UNIVERSITY OF ALBERTA

SOME PROBLEMS WITH THE CONDOMINIUM LAW IN ALBERTA

by

DONALD JOHN MANDERSCHEID

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE

OF MASTER OF LAWS

DEPARTMENT OF LAW

EDMONTON, ALBERTA

SPRING, 1983

Alberta

M.C.F.D

GOVERNMENT SERVICES
PUBLIC AFFAIRS BUREAU

Public Affairs Bureau

403/427-2754

Petroleum Plaza
9945 - 108 Street
Edmonton, Alberta, Canada
T5K 2G6

April 13, 1983

THE CITY OF EDMONTON
RECEIVED
APR 15 1983
CITY SOLICITORS
OFFICE

Mr. D. J. Manderscheid
Law Department, 8th Floor
City Hall
#1, Sir Winston Churchill Square
Edmonton, Alberta

Dear Sir:

This letter is your authorization to use the Condominium Property Act as an appendix to your thesis entitled "Some Problems with the Condominium Law in Alberta."

Thank you for your enquiry.

Yours truly,

Phil Stevens
Executive Director
Communications Production

PS:ml

T H E U N I V E R S I T Y O F A L B E R T A

RELEASE FORM

NAME OF AUTHOR DONALD JOHN MANDERSCHEID

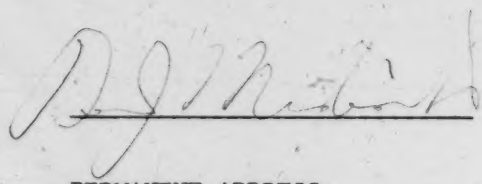
TITLE OF THESIS "SOME PROBLEMS WITH THE CONDOMINIUM LAW IN ALBERTA"

DEGREE FOR WHICH THESIS WAS PRESENTED MASTER OF LAWS

YEAR THIS DEGREE GRANTED 1983

Permission is hereby granted to THE UNIVERSITY OF ALBERTA LIBRARY to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.



PERMANENT ADDRESS:

8740 - 165 Street
Edmonton, Alberta
T5R 2R8

DATED: March 25, 1983

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled "SOME PROBLEMS WITH THE CONDOMINIUM LAW IN ALBERTA" submitted by DONALD JOHN MANDERSCHEID in partial fulfillment of the requirements for the degree of Master of Laws.

S. Khelawon

CHAIRMAN - EXAMINING COMMITTEE

Ronald C. Bishop

SUPERVISOR

J. Sherwood

EXTERNAL EXAMINER

Date: March 25, 1983

ABSTRACT

In Alberta, the newest form of land ownership is that of condominium. Its beginning dates back to 1966 with the passage in the Alberta legislature of The Condominium Property Act. In drafting this enabling legislation, the legislative draftsmen chose as a precedent the condominium legislation then in force in New South Wales. Although the Alberta Act was patterned after the New South Wales Act, the similarity between the two has since faded.

Since 1966, the New South Wales Act has undergone a series of major changes as the need arose to accommodate and overcome the problems associated with condominium living. However, the same cannot be said of the Alberta Act which has had few changes, and what changes have been made are merely of the housekeeping variety. If the New South Wales experience is any indication of the future, Alberta, like New South Wales, will experience problems with the condominium form of land ownership. These problems will not be capable of resolution if the Condominium Property Act remains in its present form.

In this Thesis, an attempt has been made to illustrate the shortcomings of the Condominium Property Act and the problems which can be expected to arise in the near future. However, the problem areas discussed in this Thesis are but a few of the problems which are created by the deficiencies of the Act. There are others, and it is submitted that when these inadequacies become apparent, the suggested solutions contained in this Thesis will provide the necessary guidance for their resolution.

ACKNOWLEDGMENT

I wish to express my gratitude to all who have assisted in the preparation of this thesis and, in particular, I wish to acknowledge the valuable assistance rendered by Professors R. G. Hopp and Dr. S. P. Khetarpal, without whose guidance the writing of this thesis would not have been possible. I am also grateful to Mrs. Z. Albus and the library staff of the John A. Weir Memorial Law Library for their assistance in helping me to acquire the source material necessary for the writing of this thesis. Lastly, a special note of gratitude to my typist Ms. C. Knysh and my secretary Ms. S. Meier for their patience in the compilation of this thesis.

TABLE OF CONTENTS

CHAPTER		PAGE
I.	CONDOMINIUM AND INTRODUCTION	1
	Introduction	1
	The Condominium Concept	1
	History	2
	Purpose of Thesis	4
II.	CONDOMINIUM OWNERSHIP AND A UNIT OWNER'S RIGHTS	5
	Introduction	5
	The Condominium Corporation	5
	The Board of Managers	6
	The Individual Unit Owners	7
	Statutory Duties of the Corporation	8
	Judicial Remedies of the Unit Owner	9
	The Right to Sue	9
	The Right to Apply for the Appointment of an Administrator	11
	The Right to Apply for Termination of the Condominium Status	12
	Indirect or Informal Remedies of the Unit Owner....	12
	Non-Compliance with the Act	13
	Non-Payment of Condominium Fees	13
	Resolution of Disputes	14
	Ontario	15
	British Columbia	16

Arbitration 17

Choosing an Arbitrator 19

Arbitration Proceedings 19

New South Wales 20

Commissioner 21

Procedure for Order 22

Procedure After Commissioner Receives Application 22

Decision of the Commissioner 23

Appeal Against Order of the Commissioner 23

Procedure of Appeal 24

Cost of the Proceedings 24

Compliance with the Orders of the Commissioner and the Board 25

Conclusion 26

III. THE VOTING RIGHTS AND BYLAWS IN A CONDOMINIUM PROJECT ... 27

Introduction 27

The Voting Rights 28

Amending the Bylaws 29

Improperly Enacted Bylaws 30

Unreasonable or Oppressive Bylaws 34

United States 34

Ontario 35

British Columbia 35

New South Wales 37

Procedure Under Section 120 38

Effectiveness of Section 120 39

Conclusion 39

IV. TORTIOUS LIABILITY IN A CONDOMINIUM PROJECT 41

Introduction 41

Examples of Tort Liability 41

Occupiers' Liability 42

Nature of the Liability 44

The General Rule 44

The Condominium Property Act 44

Section 20(3)(b) 45

Other Sections and Nature and Extent of Liability 46

The Extent of the Liability and the Satisfaction of a Judgment 48

The Unit Owners 48

The Corporation 51

Registration of a Writ of Execution 52

Execution Proceedings 52

Indirect Methods 53

Seizure 53

Levying a Contribution 53

Other Jurisdictions 56

Occupiers' Liability 56

Ontario 57

General Rule 57

New South Wales 58

United States 58

Model Provision 60

Immunization from Liability 60

Statutory Immunization 61

Massachusets 61

New Jersey 62

Incorporation 64

Condominium Act Incorporation 64

Incorporation by Corporate Legislation 65

Implementation 66

Liability Insurance 67

Statutory Insurance Provisions 67

Implementation 68

Conclusion 69

V. BUILDERS' LIENS IN A CONDOMINIUM SETTING 70

Introduction 70

Purchasing a New Unit 70

Purchaser's Liability After the Date of Conveyance 70

The Builders' Lien Act 71

Lien Fund 71

Definition of an "improvement" 72

Computation of the Statutory Time Period .. 72

Registration of a Builder's Lien After the Date of Conveyance 73

Alberta's Position 75

Land Titles Act 75

Hager Case 77

Ineffectiveness of the Provisions Contained in the Condominium Property Act 79

Section 11 80

British Columbia Act 82

Purchasing an Existing Unit 84

Maintaining the Project 84

Payment of the Lien 87

Capital Replacement Reserve Fund 87

Borrowing Funds 88

Levying of a Contribution 88

Clearing the Title of a Builder's Lien 89

Ontario 89

New York 90

Conclusion 92

VI. CONCLUSION 93

***

REFERENCES 98

APPENDIX 1 TABLE OF CASES 101

APPENDIX II TABLE OF STATUTES 102

APPENDIX III THE CONDOMINIUM PROPERTY ACT, SUPRA N. 1 CHAPTER ONE 103

CHAPTER I

CONDOMINIUM AND INTRODUCTION

I. INTRODUCTION

Prior to 1966, there were no condominiums in Alberta. In that year, the legislature enacted The Condominium Property Act[1] which permits a building to be divided into separate units with a separate certificate of title for each. The Act not only makes provision for the separate ownership of each unit but it also governs the use and ownership of those parts of the building collectively referred to as the common property. These parts are not included in any of the units into which the building is divided. Halls, stairways, entrance foyers, parking lots, and swimming pools typically form part of the common property of a condominium.

The Condominium Property Act was intended to give Alberta a form of land ownership which had long been used elsewhere to meet the problems caused by urban sprawl and the lack of building lots. Any new form of ownership, however, is bound to create new problems; and the legislature unfortunately made but a rudimentary attempt to identify and deal with the problems associated with condominium ownership.

II. THE CONDOMINIUM CONCEPT

Condominium involves the right of an individual to an estate in fee simple with respect to a specific unit in the building coupled with his right to a communal estate as a tenant in common with other unit owners in the common property. In Alberta, after a condominium plan is

---

1. S.A. 1966 c. 60, which was entitled "an Act to facilitate the division of buildings into separately owned units". In this Thesis, unless the context otherwise states, a reference to the Alberta condominium legislation shall be the Condominium Property Act, R.S.A. 1980, c. C-22.

registered, the Registrar of Land Titles is required to issue a separate certificate of title for each unit in the building.[2] No more than one unit may be included in one certificate of title; and no other land, except the unit owner's share in the common property, may be included in the same certificate of title.[3]

In Alberta, every plan presented for registration as a condominium plan shall have endorsed upon it a schedule specifying in whole numbers the unit factor for each unit in the condominium.[4] The term "unit factor" is the proportionate share of the ownership in the common property which is assigned to a unit. Each unit owner's share in the common property will therefore depend upon the unit factor so assigned to each unit.

The manner in which property in a single building may be apportioned and owned is not the only feature which makes the condominium form of property ownership unique. At common law, real property was always divided along vertical lines, and the traditional boundaries of a parcel of land were regarded as being "cujus est solum est usque ad coelum et ad infernos".[5] But the condominium form of land ownership permits a horizontal division of the column of air above the surface of the ground. This possibility of horizontal division is one of the features which differentiates the condominium form of ownership from the more traditional forms.

III. HISTORY

Condominium may have been a late arrival in Alberta but it had its

---

2. Section 3(1)(b), supra n. 1.
3. Section 3(1)(b), supra n. 1.
4. Section 6(1)(g), supra n. 1.
5. "To whomsoever the soil belongs he owns also to the sky and to the depths."

origins in antiquity.[6] In Europe, there were condominiums in use during the middle ages; and the French had codified the existing condominium law as early as 1804. Indeed, Article 664 of The Napoleonic Code was to become the model for virtually all of the condominium legislation in those European countries which recognize this form of land ownership.[7] From Europe, the concept of the condominium spread to the Americas; and in the Americas, Brazil enacted the first condominium statute in 1928.[8] Since 1928, many countries in South and Central America have adopted legislation similar to that of Brazil.[9] In North America, all but one of the American states and all of the Canadian Provinces and Territories have acknowledged the need for a comprehensive condominium statute and have legislated accordingly.[10]

The legislature of Alberta chose to follow the legislation then in effect in New South Wales[11] when it enacted The Condominium Property Act. The similarity which existed between the legislation of New South Wales and Alberta in 1966 has long since ended. The Act in New South Wales is in its second revision and has been expanded from 29 to 160 sections.[12] During the same period of time, Alberta has made a number of significant amendments to its original legislation. However,

---

6. A. Rosenberg, Condominium in Canada, (1972) 2-2.
7. A. Rosenberg, Condominium in Canada, supra n. 6 at 2-5.
8. Vol. I, A. Ferrer and K. Stecher, Law of Condominium, (1967) 40.
9. A. Rosenberg, Condominium in Canada, supra n. 6 at 2-5.
10. For a list of the Canadian condominium legislation, see D. J. Pavlich, The Strata Titles Act (1978) 6; and in the American context, the sole exception is the State of Vermont and for a complete list of the 52 statutes and the date each was passed, see Vol. I, A. Ferrer and K. Stecher, Law of Condominium, supra n. 8 at 129; see also, A. Rosenberg, Condominium in Canada, supra n. 6 at 2-8.
11. The Conveyancing (Strata Titles) Act, (N.S.W.-AUS), 1961 c. 17 (Old Act) and Strata Titles Act, (N.S.W.-AUS), 1973, c. 68 (New Act).
12. N. J. Moses and R. Tzannes, Strata Titles (1978) V.

such amendments have tended to modify the existing sections rather than add to them and as a result, the present legislation contains only 24 sections more than did the original Act.

In refining its Act as it has done, New South Wales was attempting to solve the problems created by condominium ownership. Alberta is presently experiencing many of the same problems, but its legislature has done little, if anything, to solve them.

IV. PURPOSE OF THESIS

This Thesis will examine some of the unique problems associated with condominium and will propose certain tentative solutions to those problems. Generally, the problems considered will involve the relationship of the unit owners inter se, their relationship with the governing body and management of the corporation, and their relationship with third parties. The statutes of British Columbia, Ontario, New South Wales, and certain American states will be referred to extensively.

CHAPTER II
CONDOMINIUM OWNERSHIP AND A UNIT OWNER'S RIGHTS

I. INTRODUCTION

In Alberta, a condominium is created by registering a condominium plan in the prescribed form at the Land Titles Office.[1] Once a condominium is created, there are three distinct parties in its organizational structure: the corporation, the board of managers, and the individual unit owners.

A. The Condominium Corporation

The corporation consists of all those persons who at any given time own units in the parcel to which the condominium plan applies. The condominium corporation has all of the powers given to the ordinary body corporate by Section 16 of the Interpretation Act:[2]

> 16 Words in an enactment establishing a corporation
>
> (a) vest in the corporation power
>
> (i) to sue in its corporate name,
> (ii) to contract and be contracted with by its corporate name,
> (iii) to have a common seal and to alter or change it at pleasure,
> (iv) to have perpetual succession,
> (v) to acquire and hold real property and personal property for the purposes for which the corporation is established and to dispose of the real property or personal property at pleasure, and
> (vi) to regulate its own procedure and business,
>
> (b) make the corporation liable to be sued in its corporate name;
>
> (c) vest in a majority of the members of the corporation the power to bind the others by their acts;

---

1. Section 6(1), supra n. 1 of Chapter One.
2. R.S.A. 1980, c. I-7.

(d) exempt from personal liability for its debts, obligations or acts those individual members of the corporation who do not contravene the provisions of the enactment establishing the corporation;

(e) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, vest in the corporation power to use either the English or French form of its name or both forms and to show on its seal both the English and French forms of its name or to have 2 seals, one showing the English and the other showing the French form of its name.

These general powers given to a condominium corporation are, of course, subject to its bylaws and to the provisions contained in the Condominium Property Act, just as the powers given to the ordinary body corporate were once limited by its Memorandum and Articles of Association and the provisions contained in The Companies Act.[3]

The condominium corporation is also given these additional powers by Section 20(3) of the Condominium Property Act:

20(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and
(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

The Companies Act does not apply to a condominium corporation.[4]

B. The Board of Managers

The condominium corporation, being an artificial person created by

---

3. R.S.A. 1970, c. 60.
4. Section 20(4), supra n. 1 of Chapter One. It is suggested that there has been a legislative error in that the Business Corporations Act, R.S.A. 1980, c. B-15 is now in force in Alberta therefore making The Companies Act redundant for future use.

statute, must exercise its powers through the agency of real people. Under Section 23 of the Condominium Property Act, the corporation is required to have a board of managers which shall be constituted as provided by the bylaws of the corporation. The powers and duties of a corporation shall be exercised by the board of the corporation,[5] subject to any restriction imposed or direction given at a general meeting. So long as each member of the board acts in good faith, he has no liability for what he does in respect of the corporation, even if it is afterwards discovered that there was some defect in the election or appointment or continuance in office of that person.[6]

C. The Individual Unit Owners

The unit owner is the owner in fee simple of a unit contained in a condominium and the owner, as tenant in common, of a proportionate part of the common property in that condominium. His voting rights are determined by the unit factor for his unit and may be exercised by him unless his interest is subject to a registered mortgage of which written notice has been given to the corporation, in which case the mortgagee has the voting rights which would otherwise be exercisable by the unit owner. If there are two or more mortgages against the unit, only the first mortgagee is given the vote. However, in all cases where a unanimous resolution is not required, the right to vote is given to the unit owner, provided, the mortgagee is not present personally or by proxy.[7]

The individual unit owners from time to time comprise the corporation. They or their mortgagees have the power to elect the board

---

5. Section 23(2), supra n. 1 of Chapter One.
6. Section 23(3), supra n. 1 of Chapter One.
7. With respect to the voting rights of the unit owner and the mortgagee, see Section 21 of the Act, supra n. 1 of Chapter One.

of managers. The unit owners may be adversely affected by the acts of the corporation or the board; and the corporation, by their acts.

II. STATUTORY DUTIES OF THE CORPORATION

Each condominium corporation is responsible generally for the enforcement of its bylaws and the control, management and administration of the common property.[8] More specifically, its duties include the following:

(a) To keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property.

(b) To comply with notices or orders by any local authority or public authority requiring repairs to or work to be done in respect of the parcel.[9]

Obviously this list is far from complete but it is sufficient to illustrate the scope of the duties of the corporation and the importance of the performance of those duties to the unit owners. All of the duties are mandatory and the unit owners are entitled to insist on their performance. As Holland J. said in Jacklin v. Strata Plan No. 2795:[10]

> "There flows from the scheme of the legislation as an incident of proprietorship of a lot a right in each proprietor to have the body corporate's duty performed in relation to all of the common property at the cost and expense of all proprietors in proportion to unit entitlements. As the duty is not only to repair and maintain but also to control, manage and administer, the right of each proprietor includes the right to have the whole administration of repairs and maintenance of common property carried out by the body corporate by its servants and agents."[11]

---

8. Section 30(1), supra n. 1 of Chapter One.
9. Section 30(2), supra n. 1 of Chaper One.
10. (1975) 1 N.S.W.L.R. 15.
11. Supra n. 10 at 24.

As the value of any right depends upon its possessor's ability to enforce it, the remedies given the possessor to compel performance are as important as the right itself.

III. JUDICIAL REMEDIES OF THE UNIT OWNER

There would seem to be but three remedies afforded an unhappy unit owner under the Condominium Property Act: the right to sue, the right to apply for the appointment of an administrator, and the right to apply for termination of the condominium status.

A. The Right to Sue

The first right, is the right to sue the corporation under Section 20(3)(b):

> 20(3) Without limiting the powers of the corporation under this or any other Act, a corporation may
>
> (b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

Although there is no limitation placed on the nature of the relief which might be sought in such an action, the remedy of damages for simple non-performance would seem inappropriate. An award of damages would require a contribution by all other unit owners of each one's proportionate share of the judgment. Even though one unit owner commenced the action, the other unit owners would be as much aggrieved by the non-performance as he. Why, then, should they jointly be required to compensate him? If one wished to carry this argument to extreme lengths, he could point to the situation in which all of the unit owners individually commenced actions against the corporation for non-performance of its duties. Presumably each would obtain a judgment against the corporation and each would be required to contribute to the satisfaction of all other judgments, thereby eliminating the value of his own.

Much more promising is the type of relief which might be given by a mandatory injunction requiring the corporation to perform its duties. This was the type of relief sought in Winter v. Playa Del Sol Inc.[12] in which the plaintiffs, non-resident condominium unit owners brought an action against the defendant condominium corporation for an order compelling the corporation to allow them to make written notations from the condominium's records. Although the defendant had allowed the plaintiffs to inspect the records, it had prohibited them from making notations. The relevant legislation merely allowed the plaintiffs to inspect the records. In deciding to grant the mandatory injunction, Cross J. said this:

> "In the instant case, it appears that the privilege of inspection of condominium association accounts afforded by statute to condominium owners should carry with it the right to make hand written notations from the records. Permitting copying is the only result that is consistant with various judicial interpretations of statutory rights to inspection of records. It appears that the plain meaning of the statute is to allow the condominium owners access to the information in the records of the association, even to the extent of furnishing owners written summaries at least annually."[13]

It would seem, therefore, that an aggrieved unit owner might readily obtain a mandatory injunction against a condominium corporation which neglected or refused to perform the duties imposed upon it by the statute or its bylaws. It must be noted, however, that as there is no specific statutory right to a mandatory injunction, such relief will only be granted by the Court if the injury is of such a nature that it could never be adequately remedied or atoned by an award of damages.[14]

---

12. (1977) 353 S.O. (2d) 598.
13. Supra n. 12 at 599; see also, In the Matter of Adrian Blunt and Strata Corporation VR 45, (1977) 1 B.C.L.R. 36.
14. Canadian Pacific Ry. Co. v. Canadian Northern Ry. Co., (1912) 3 W.W.R. 4 at 10.

B. The Right to Apply for the Appointment of an Administrator

The second remedy is one open to both the corporation and an aggrieved unit owner when a corporation is being hopelessly mis-managed or in danger of becoming so by the board of managers. This remedy is given by Section 49 of the Condominium Property Act:

> 49(1) A corporation or person having an interest in a unit may apply to the Court for appointment of an administrator.
>
> (2) the Court may, on cause shown, appoint an administrator for an indefinite period or for a fixed period on any terms and conditions as to remuneration or otherwise that it thinks fit.
>
> (3) The remuneration and expenses of an administrator appointed under this Section are administrative expenses within the meaning of this Act.
>
> (4) An administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders.
>
> (5) An administrator may delegate any of the powers or duties so vested in him.
>
> (6) The Court may, on the application of an administrator or person referred to in subsection (1), remove or replace the administrator.

The Court will only appoint an administrator on cause shown. Presumably an administrator would not be appointed on the basis of an isolated event or events unlikely to recur. This conclusion is supported by the judgment of Else-Mitchell J. in Steel and the Conveyancing (Strata Titles) Act 1961:[15]

> "There is no doubt in my mind that in these respects there have been breaches of the fiduciary duty which flows from membership of a council of a body corporate under the Conveyancing (Strata Titles) Act 1961. That Act does not specify the grounds on which the Court in its discretion may appoint an administrator but uses

---

15. (1968) 2 N.S.W.R. 796.

> the expresion "on cause shown". Such cause may be found in a wide variety of circumstances and situations entailing non-feasance or mis-feasance by the Council of a body corporate which it would be impossible to catagorize exhaustively. For the present purposes it is, I think, sufficient to say that in the absence of cogent explanation or general agreement a clear and continuing failure arising under the bylaws in the First Schedule will constitute ground for seeking the appointment of an administrator."[16]

C. The Right to Apply for Termination of the Condominium Status

Finally, as an alternative to seeking the appointment of an administrator, an aggrieved unit owner may apply to the Court under Section 52 of the Act for termination of the condominium status. The relevant provisions of Section 52 read as follows:

> 52(1) An application to terminate the condominium status of a building may be made to the Court by the corporation, an owner, a registered mortgagee of a unit or a vendor under an agreement for sale of a unit.
>
> (2) On an application under this section, if the Court is satisfied that, having regard to the rights and interests of the owners as a whole, it is just and equitable that the condominium status of the building should be terminated, the Court may make a declaration to that effect.

Because of the serious nature of an application under Section 52, it is suggested that a Court should not order termination unless the appointment of an administrator would be of no use to the corporation. To date, however, the Courts in Alberta have not been faced with the problem of judging an application brought under Section 52.

IV. INDIRECT OR INFORMAL REMEDIES OF THE UNIT OWNER

As the Act is limited in its judicial remedies, an aggrieved unit owner may have to resort to indirect or informal means of having the duties of the corporation performed. There are two such methods. Firstly, the unit owner may cause the board members to be personally

---

16. Supra n. 15 at 799.

liable for failing to perform their statutory duties and secondly, he can cease payment of his condominium fees.

A. Non-Compliance with the Act

The first method is made possible by Section 71(3) of the Act:

> 71(3) If a corporation fails to comply with this Act, each member of the board who is knowingly a party to that failure is guilty of an offence and liable on summary conviction to a fine of not more than $500.00.

The duties of the corporation are created by the Act and, therefore, a breach of duty would constitute a non-compliance with the Act. Accordingly, a knowing failure of duty on the part of the members of the board could result in a conviction under Section 71(3) of the Act. If such a conviction were obtained, it might provide the necessary incentive for the members of the board to carry out the duties of the corporation.

B. Non-Payment of Condominium Fees

The second indirect or informal remedy, non-payment of condominium fees, is somewhat more controversial. When a unit owner refuses to pay condominium fees, the corporation may bring an action in debt against him and may file a caveat against his certificate of title.[17] Non-payment by the unit owner will almost invariably result in an action either in debt or in foreclosure. At the trial of the action the unit owner could raise as a defence for such non-payment that the corporation was failing to carry out its duties. In the case of The Owners' Strata Plan BR162 v. Zapantis,[18] the Court indicated that it would permit a

---

17. Section 31(2) and 31(4) supra n. 1 of Chapter One.
18. Unreported, June 1, 1977, Vancouver Registery, 837-77 (B.C. Provincial Court).

unit owner, as a defence to a claim for arrears in maintenance by the corporation, the right to withhold payments where that corporation had withdrawn services and common facilities from that unit owner.

Although these persuasive measures may prove useful to compel the board of managers of the corporation to fulfill its duties, such measures are persuasive only and there is no assurance that they will work in all cases. Furthermore, such measures would prove futile in any situation where time is of the essence. Such situations can arise where the non-performance of the corporation's duty to repair and maintain the common property results in daily damage to the individual's unit, for example, such damage as would be caused by a leaking roof. In a situation such as this, time would be an important factor and any lengthy delay in performance would only increase the damage which is being occasioned to the unit. Aside from these persuasive measures and the rights under Sections 20(3)(a), 49, and 52, the Act does not provide a specific remedy that would enable a unit owner to enforce compliance with the Act.

V. RESOLUTION OF DISPUTES

If the objectives sought from a condominium are to be attained, the enabling condominium legislation must provide the necessary machinery for the resolution of disputes which concern the non-performance of the corporation's duties. In accomplishing this objective, the Alberta Act has failed. The primary cause of this failure was the omission on the part of the drafters of the legislation to provide a unit owner with a specific course of action which could be used to compel the corporation to fulfill its obligations under the Act.

Although the Act does make provision for a unit owner to bring an action against the corporation, such a right is contingent upon the

matter in dispute coming within the scope of the remedial provision. Further, the alternative courses of action that a unit owner may resort to in having the corporation perform its duties are either purely persuasive or cannot be invoked if the dispute relates to an isolated breach of duty.

From the analysis given above, it can be seen that the remedies afforded an aggrieved unit owner by the Condominium Property Act are slow, expensive or extreme, and none of them really are capable of assuring that the unit owner will obtain what he wants: the proper administration and management of the condominium. Other jurisdictions such as Ontario, British Columbia and New South Wales have recognized the need to develop new, less costly and more expeditious and reliable remedies.

A. Ontario

In Ontario, there is a specific provision which allows a unit owner to apply for a mandatory injunction. This provision is contained in Section 49 of The Condominium Act:[19]

> 49(1) Where a duty imposed by this Act, the declaration,[20] the bylaws or the rules is not performed, the corporation, any owner, the bureau or any person having a registered mortgage against the unit and common interest, may apply to the Court or District Court for an order directing the performance of the duty.

---

19. S.O. 1978, c. 84.
20. The declaration is equivalent to a condominium plan under the Alberta Act. However, unlike the Alberta counterpart, the declaration under the Ontario Act contains a great deal more in terms of outlining the government of the condominium project. For a more precise contrast between the terms declaration and condominium plan as those terms are referred to in the various provincial condominium legislation, see A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 1-14.

In addition to directing the performance of the duties, the Court may include in the order any provisions that it considers appropriate under the circumstances. Any order granted under Section 49 of the Act does not affect other remedies which may be available against the corporation for a failure to perform a duty imposed by the Act.[21]

In the case of Re Key et. al. and St. George Holdings Co. Ltd. et. al.[22], an application was heard by the Court pursuant to Section 23 (now Section 49) of the Act. Although the application concerned an alleged breach of duty on the part of certain unit owners, the decision is still relevant as the judgment appears to imply that in order for the provisions contained in Section 49 to become operative, the non-compliance must be material. In denying the particular application before him, Keith J. stated:

> "It is urged on me that under the provisions of Section 12 of the Act, each owner being bound to comply with the Act, the declaration and the bylaws and having a right to the compliance by the other owners with the Act, the declaration and the bylaws, and the boundary lines being shown as they are on the registered plan, that I really have no alternative under Section 23(2), but to make an order that they be complied with...No question arises with respect to the use to be made of the actual units, as this is a permissible use and has been from the inception of the whole project. There were some reasons advanced as to why this proposed use would be inimical to the interests of the residential holders, but I doubt that unless it is shown that their real interests in the common elements of the condominium have been affected (and this has not been shown) that one should be particularly impressed with what I suspect are largely fanciful objections to the use being made. In my view there is no substance to this application."[23]

B. Britsh Columbia

British Columbia[24] has a provision[25] similar to Section

---

21. Section 49(5) supra n. 19.
22. (1972) 28 D.L.R. (3d) 168.
23. Supra n. 22 at 170.
24. Condominium Act, R.S.B.C. 1979, c. 61.
25. Section 40 supra n. 24.

49(1) of the Ontario Act, but its Section, unlike that of Ontario's specifically states that the remedy is a mandatory injunction. To date, the only reported British Columbia decision which deals with this Section is In The Matter of Adrian Blunt and Strata Corporation VR45.[26] In that case, the facts were that the council of the strata corporation, without presenting a proposed expenditure to the owners through the budget at an annual general meeting, contracted for the painting of the exterior of the building and paid a price of $2,400.00. Blunt, an owner, resisted payment of his portion of the account on the ground that the expenditure had not been authorized by special resolution. The council argued that it was only complying with its duty to repair under the Act. In the end result, the Court refused to grant an injunction despite finding for Blunt, because the chairman of the council undertook to place the matter before the owners at the next annual meeting, one and a half months from the date of the decision. However, leave was granted to apply for an injunction should the council refuse to place the matter before the owners at the next annual general meeting or if the annual general meeting was delayed beyond the end of the month of the Court's judgment.

1. Arbitration

In British Columbia, as an alternative to an action for a mandatory injunction, the condominium legislation provides for an arbitration to settle disputes concerning non-performance of a corporation's duties. The arbitration procedure is contained in Sections 44 and 45 of the Act which provide that where a dispute arises between the strata corporation and the unit owner, concerning "any matter", the matter in dispute may be referred to arbitration.[27] It is not mandatory that the parties attempt to resolve this dispute by arbitration; one or the other can

---

26. Supra n. 13.
27. Section 44(1) supra n. 24.

commence an action, and the commencement of an action will bar any subsequent arbitration. If there has been no action commenced, the arbitration proceedings can be initiated by the strata corporation or the unit owner and notice must be given by the grievor to all the parties to the reference.[28] Within two weeks of the receipt of this notice, the respective parties to the reference must agree upon and appoint a single arbitrator.[29] If the parties cannot agree on an arbitrator, each party is given a period of one week from the time the initial period has elapsed in which to appoint an arbitrator of his or its choice, and the arbitrators so appointed must appoint a third arbitrator who will serve as the chairman.[30] If the arbitrators are unable to come to some agreement as to the appointment of the chairman, then the provisions of the Arbitration Act[31] apply.[32]

By virtue of Section 8(d) of the Arbitration Act, if the arbitrators fail to appoint a chairman, any party to the reference may serve the arbitrators with a written notice to appoint or concur in the appointment of a chairman. If an appointment is not made pursuant to the notice mentioned in Section 8(d) within seven clear days after such notice is served, then, Section 8(e) of the Arbitration Act provides that the Court shall, on application by the party who gave the notice, appoint a chairman, such chairman having the same power to act in the reference and make an award as if he had been appointed by the parties or by the arbitrators respectively and with the consent of all parties.

---

28. Section 44(1) supra n. 24.
29. Section 44(2) supra n. 24.
30. Section 44(3) supra n. 24.
31. R.S.B.C. 1979, c. 18
32. Section 45(6) of the Condominium Act, supra n. 24, provides that the provisions of the Arbitration Act, supra n. 31 except insofar as they relate to the question of two arbitrators appointing a chairman, do not apply to arbitration proceedings under the Condominium Act.

(a) Choosing an Arbitrator

The choosing of an arbitrator is not considered under the Act as an empty formality; and to insure that a qualified, unbiased individual is chosen, the Act imposes certain conditions as to a potential candidate. Firstly, the individual chosen must have been an owner and occupier of a strata lot in another strata development for at least one year.[33] Secondly, such an individual, unless otherwise agreed by the parties to the reference, cannot be a unit owner in the strata project which is affected by the arbitration proceedings.[34]

(b) Arbitration Proceedings

After a suitable arbitrator or suitable arbitrators have been appointed, the reference is heard informally in a convenient place within the strata project or any other convenient location.[35] The arbitrator or arbitrators will conduct the hearing in the manner that he or they feel appropriate under the circumstances and such latitude of authority also pertains to the presenting, rebutting and form of evidence that is presented throughout the proceedings.[36] In rendering the judgment, the arbitrator or arbitrators may make any award that he or they feel is just and equitable, and such an award may include an order in the nature of a mandatory or prohibitive injunction or the payment of damages.[37] To insure that the judgment of the arbitrator or arbitrators is complied with, the Act provides that the judgment may be entered in the registry of the Court and enforced with leave of the Court in the same manner as a judgment or order of that Court.[38] The judgment of the arbitrator or arbitrators is final and

---

33. Section 44(4) supra n. 24.
34. Section 44(4) supra n. 24.
35. Section 45(1) supra n. 24.
36. Section 45(2) supra n. 24.
37. Section 45(4) supra n. 24.
38. Section 45(5) supra n. 24.

binding on the parties and there is no right to an appeal.[39] Since the results of the arbitration are as binding as a judgment of the Court, a party to an arbitration can gain the same relief as could be provided by a Court, with less expense and time involved.

C. New South Wales

Although the Ontario and British Columbia condominium Acts provide a number of remedies which are important to the unit owner, they have yet to achieve the perfection of the New South Wales condominium legislation.

In New South Wales, the legislature has all but eliminated the need for judicial intervention in any matter which concerns a dispute between a unit owner and the corporation. It did so as a direct consequence of the failure of the original Act of 1961 to provide an effective means for resolving disputes between the unit owners and the corporation. In order to overcome the remedial deficiencies which had plagued the original Act, the draftsmen of the 1973 Act introduced an intricate remedial structure involving remedies at two levels below the level of the Supreme Court, and administered by two functionaries. These functionaries were the commissioner, the function and duties of which are exercised in an informal manner and the board whose proceedings resemble that of a formal Court hearing.[40]

---

39. There is no right to an appeal provided in the Condominium Act, supra n. 24 of Chapter Two. However, as the Arbitration Act, supra n. 31 does not apply by virtue of Section 45(6) of the Condominium Act, and as by virtue of Section 4(h) of the Arbitration Act "the award is final and binding on the parties and the persons claiming through them" therefore, providing no right of appeal, it can be stated that there is no right to an appeal from an arbitration brought pursuant to Sections 44 and 45 of the Condominium Act.
40. N. J. Moses and R. Tzannes, Strata Titles, supra n. 12 at 149 of Chapter One.

1. Commissioner

The commissioner is appointed by the Governor and under the Act is provided a large range of authority. By virtue of Section 104.(3) of the Act, the commissioner has the requisite power to order:

> 104.(3) For the purposes of this division, the commissioner may order a body corporate, a managing agent, a proprietor, any person having an estate or interest in a lot or an occupier of a lot to do, or to refrain from doing, a specified act with respect to a strata scheme.

Further by virtue of Section 105.(1) of the Act, the commissioner has the following additional powers:

> 105.(1) Except in the case of a dispute or complaint to be settled or rectified by an order under Division 4, the commissioner may, pursuant to an application of a body corporate, a managing agent, a proprietor, any person having an estate or interest in a lot or an occupier of a lot in respect of a strata scheme, make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the bylaws in connection with that strata scheme on any person entitled to make an application under this section or on the chairman's secretary or treasurer of the body corporate of the council.

2. Procedure for Order

The procedure involved for the obtaining of an order pursuant to Sections 104.(3) and 105.(1) of the Act is contained in Section 100 of the Act which sets out the steps to be followed. Section 100 reads as follows:

> 100.(1) Application for an order under this part shall be made to the commissioner in writing specifying the grounds on which it is to be made, shall specify the order sought and shall be accompanied by the prescribed fee and the prescribed deposit, if any.

(2) The commissioner may refer to a board in the application made to him for an order under Division 3 if he is of the opinion

(a) that the application raises matters of legal complexities;
(b) that the importance of the subject matter of the application or the possibility of the frequent recurrence of like applications warrants its reference to a board; or
(c) that for any other reason it should properly be referred to a board.

(3) The commissioner shall refer to a board any application made to him for an order under Division 4.

(4) A board to which, pursuant to this section, the commissioner is required or entitled to refer an application for an order under this part is the board that, in the opinion of the commissioner, is situated nearest to the parcel that is subject to the strata scheme in respect of which the order is sought.

(5) Nothing in this section shall be construed as conferring on an applicant for an order under Division 3 any right to have his application referred to a board.

3. Procedure After Commissioner Receives Application

After receipt of an application for an order, the commissioner has the following authority:

101.(1) After receipt of an application for an order under this part, the commissioner

(a) may require the applicant to provide him with such further information in relation to the application as, in his opinion, may assist the investigation of the application;
(b) may refuse to proceed with the application until a requirement made by him pursuant to paragraph (a) has been complied with;
(c) shall give written notice of the application to the body corporate for the strata scheme to which the application relates and to any other person, not being the applicant, who, in his opinion, would be affected if the order sought were made;

(d) shall, in a notice referred to in paragraph (c), specify the order sought and invite the body corporate and any member thereof and any other person whom the notice is given to make to him, within a time specified in the notice, a written submission in respect of the matter to which the application relates;
(e) shall, in a notice referred to in paragraph (c), further specify that any person whom the invitation referred to in paragraph (d) is extended will only be entitled to appear before any board to which the application may be referred if he has made a written submission in response to the notice and in that submission has stated that he wishes so to appear in the event of the application being so referred;
(f) may make such other investigations with respect to the application as he thinks fit, including investigations requested by a board, and
(g) may enter upon any lots subject of the strata scheme concerned for the purpose of carrying out any investigation with respect to the application at any reasonable time on notice given to any occupier of that lot and may enter upon the common property.

4. Decision of the Commissioner

Once the written submissions have been received, and all necessary investigations completed, the commissioner renders a decision based on the information obtained from the submissions and from his investigations. In accordance with Section 115 of the Act, the decision of the commissioner must be in writing and a copy of the written order must be served on the body corporate of the strata scheme concerned, any person who has made a written submission and any person who is required by the order to do or to refrain from doing a specified act.

5. Appeal Against Order of the Commissioner

The applicant for the order, any person who has made written submissions to the commissioner, and any person required to do or to refrain from doing a specified act may appeal the commissioner's

decision to a Strata Titles Board within 21 days of the date upon which the order takes effect.[41]

6. Procedure for Appeal

The board prior to the making of an order must conduct a thorough investigation of the matter, "without regard to legal forms or solemnities".[42] The board may hold a hearing before which the parties to the dispute may appear, and in conducting the hearing the board is not bound to apply the rules of evidence, whether or not the hearing is conducted formally.[43] An applicant may appear personally, by agent or by legal representatives who may examine witnesses and address the board on behalf of the applicant.[44] The decision of the board must be in writing and an appeal from such a decision lies in the Supreme Court of New South Wales only on a question of law.[45]

7. Cost of the Proceedings

On the subject of costs, the general rule is that neither the board nor the commissioner may make any awards but the Act does provide an exception. The exception to the rule is found in those cases where the Court decides that proceedings commenced in Court to enforce any rights or remedies could have been brought under the dispute provisions of the Act. In such a case, the plaintiff must pay the defendant's costs in the amount determined by the Court.[46] By making an award of costs

---

41. Section 128.(1) supra n. 11 of Chapter One.
42. Section 132.(1) supra n. 11 of Chapter One.
43. Section 132.(2) supra n. 11 of Chapter One.
44. Section 134.(1) supra n. 11 of Chapter One.
45. Section 130.(1) supra n. 11 of Chapter One; see also, N. J. Moses and R. Tzannes, Strata Titles, supra n. 12 at 168 of Chapter One.
46. Section 146 supra n. 11 of Chapter One.

in such cases possible, the Act provides the necessary incentive for individuals to have their disputes resolved according to the dispute provisions of the Act rather than by clustering the legal system with disputes that do not warrant adjudication by the Courts.

8. Compliance with the Orders of the Commissioner and the board

To insure that the orders of the commissioner and the board are complied with, the Act stipulates that any person who contravenes such orders is liable to a fine of $100.00 and for each day during which the order is not obeyed a further $10.00 a day, up to a maximum fine of $500.00.[47] Prosecutions for a breach of such orders are taken in a Court of Petty Sessions before a Stipendiary Magistrate.[48] The penalty levied is recoverable as a debt by the person who instigated the proceedings for the offence.[49] In addition, any person who contravenes an order may be held accountable for the costs of the action.

The single most necessary ingredient of an enabling condominium legislation is its ability to provide a workable dispute formula. In the New South Wales context, this requirement was absent in the original 1961 Act and in order to rectify this deficiency, intricate dispute provisions were codified in the 1973 Act. Although these dispute provisions appear somewhat involved in nature to the normal individual, their value in providing relief which is fast and inexpensive far outweighs the procedural drawbacks.

---

47. Section 142 supra n. 11 of Chapter One.
48. Section 157 supra n. 11 of Chapter One.
49. Section 157 supra n. 11 of Chapter One; and see generally N. J. Moses and R. Tzannes, Strata Titles, supra n. 12 at 174 of Chapter One.

VI. CONCLUSION

In terms of legislative age, the Alberta Act is still to be considered as a relatively recent piece of legislation. With urban property at a premium, the condominium form of property ownership has only now become an attractive form of home ownership. Many of the problems which accompany this form of property ownership have, therefore, yet to be experienced and the strengths and weaknesses of the Alberta Act have yet to be ascertained. As mentioned previously, the Alberta Act was modeled on the 1961 New South Wales precedent and although the Alberta Act has yet to be tested, the New South Wales Act has undergone a testing process. Through experience, the legislature of New South Wales found their condominium Act to be deficient in that it failed to provide the essential remedies for the resolution of disputes between the unit owner and the corporation. As a result of this deficiency, the legislature of New South Wales revised its Act and introduced a remedial scheme which would circumvent any further remedial deficiency. The dispute provisions which were introduced in the new Act have made available to the average condominium owner, an efficient, informal and inexpensive vehicle for dispute resolution, thus circumventing the need to resort to the Courts for an adjudication of the matter in dispute. The New South Wales precedent for dispute resolution has been recently adopted by the Ontario legislature[50] and it is submitted that the Alberta legislature should follow Ontario's example and enact similar legislation. If the New South Wales experience is any indication of the experiences which Albertans will face, such legislation will be a necessity if the condominium concept is to survive as a viable form of property ownership in Alberta.

---

50. Sections 56 and 57 of the Ontario condominium Act supra n. 19.

CHAPTER III

THE VOTING RIGHTS AND BYLAWS IN A CONDOMINIUM PROJECT

I. INTRODUCTION

In Alberta, every condominium project is regulated by bylaws made by the corporation. These bylaws provide for the control, management, administration, use and enjoyment of the units and of the common property. In the interval between the registration of a condominium plan and the making of such bylaws, the corporation is governed by the bylaws set out in Appendix I of the Act.[1] In providing these bylaws the legislature has attempted to provide a maximum amount of freedom to the unit owners while ensuring a minimum amount of interference with the rights of each other. These bylaws however are merely exemplary of a basic set of bylaws and it is therefore impossible for them to accommodate all the various forms of condominium projects.

When a condominium project is brought into being, the terms and covenants contained in the bylaws cannot always be correctly determined and at a later date, a revision of the governing structure of the project may be required.[2] Accordingly, in order to meet the present needs of the project's membership, the legislature has provided the unit owners with the requisite power to effect a change in the bylaws. By virtue of Section 26(2) of the Act it is possible for any bylaw to be amended, repealed or replaced by a special resolution passed or signed by not less than 75% of all persons entitled to exercise the powers of voting and representing not less than 75% of the total unit factors for all the units.

That the bylaws can be changed and, more particularly, changed in the manner set out in Section 26(2) creates a number of problems.

---

1. Section 27, supra n. 1 of Chapter One.
2. R.C.B. Risk, "Condominiums in Canada" (1968) 18 U of T L.J. 1 at 39.

First, as has been noted in Chapter Two,[3] the one most affected by a change in the bylaws - an owner in residence - will not have a vote if his unit is subject to a registered mortgage and if the mortgagee is present personally or by proxy. Second, unit owners who bought when certain bylaws were in effect and who do not approve of a change may be forced into accepting a change if a special resolution is passed. In terms of remedying these problems, the Alberta Act is deficient in that it fails to provide the viable means for redress; and it is this omission which is the subject of this Chapter.

II. THE VOTING RIGHTS

Under the scheme of voting contained in the Act, there can only be one vote cast per unit[4] and as both the mortgagee and the unit owner have a vested interest in the mortgaged property, it must be determined which of the two has the right to exercise the vote. In recognition of the fact that the lending institutions have, "...a general interest in the preservation of the property and efficiency, integrity and stability of the management..."[5] of a project, the legislature has opted to give to the mortgagee first in priority the right to vote.

It must be noted that, by conferring the right to vote on the mortgagee first in priority, the legislature has failed to recognize the interests of unit owners and second mortgagees whose respective or combined interests may be greater than that of the first mortgagee.

Fortunately for those unit owners who have their condominium interests mortgaged, the various mortgage companies in Alberta who hold first mortgages on such property have proven apathetic in exercising their right to vote and in practise it is the unit owner who often gets

---

3. See pages 6-7 of Chapter Two.
4. Section 21, supra n. 1 of Chapter One.
5. R.C.B. Risk, "Condominiums in Canada", supra n. 2 at 69.

the right to vote by mere default. However, it is conceivable that if such an apathetic attitude were to change, and if such voting rights were exercised, a mortgage company which financed an entire project could enact bylaws that were wholly in its interest and contrary to the interests of the majority of the unit owners. In such a situation, the aggrieved unit owners would have no recourse or remedy under the Act.

The legislature of the Province of British Columbia recognized this possibility when it enacted Section 72(6) of the Act. This provision reads as follows:

> 72(6) Where, under section 18, a mortgagee has acquired the voting rights of 51% or more of the owners, or one person owns 51% or more of the strata lots and their voting rights, the exercise of those voting rights in an oppressive or unconscionable manner may be enjoined by the Court on an application of a majority of the owners affected.

If the British Columbia provision is any indication of what steps must be taken in Alberta to circumvent the problems associated with mortgage financing in the condominium area, then Section 72(6) of The British Columbia Act may serve as a valuable precedent to the Alberta legislature when it decides to enact similar protective legislation.

III. AMENDING THE BYLAWS

As condominium living necessitates that individuals who are diversified in their aesthetic and social values dwell in close proximity, it is therefore inevitable that a conflict of interest may exist within the group of owners. To prevent such a conflict, the governing policy is that the decision of the majority group overrule that of the minority. Although the majority standard may represent a reasonable approach to the task of governing a condominium project, it has its disadvantages.

As all the unit owners in a condominium project are governed by the rule of the majority, if the majority is large enough, it can through the bylaws virtually dictate to the minority the terms upon which the project shall be operated. In such a situation, provided the bylaws were properly enacted, an aggrieved unit owner would have no right to seek redress under the Act. The only protection afforded a member of the minority are that a bylaw be enacted in accordance with the procedural requirements of the Act and be within the governing competence of the corporation.[6] If a bylaw meets these prerequisites, the traditional attitude of the Courts has been to adhere to the wishes of the majority.[7]

IV. IMPROPERLY ENACTED BYLAWS

All bylaws in order to be valid must be properly enacted. They can be challenged if the proper procedure is not followed, if they do not obtain the required support, and if they exceed the powers of the corporation. The powers of the corporation are limited to making provisions for the regulation of the use of the unit and common property. They do not extend to taking that property nor do they extend to making regulations that are of no conceivable value to the majority and of considerable harm to one or more individuals. An illustrative example of a case in which the majority improperly enacted a bylaw which did not comply with the technical requirements of the enabling legislation and which effected a taking of the common property is found in Grimes v. Moreland.[8]

---

6. "Symposium on Condominiums" (1974) 48 St. John's Law Review 1 at 1135; see also, D. J. Pavlich, The Strata Titles Act, supra n. 10 Chapter One at 97.
7. Supra n. 6 at 1135 and cases cited thereat.
8. (1974) 322 N.E. (2d) 699.

In that case, several condominium unit owners desired to erect fences and install air conditioning compressors on the common area. To validate this conduct, the members of the condominium project amended the condominium documents by a 76% vote. The only requirement contained in the amendment was that an individual must first obtain the consent of the board of directors prior to the erecting or installing of a fence or compressor. Certain of the unit owners obtained the necessary consent of the board and began to build fences and install compressors on the common area. Although the majority of the unit owners had favoured the amendment, one unit owner objected to the construction of the fences and the installing of the compressors on the basis that the placing of such fences and compressors was a taking of the common area property.

If the placing of the fences and compressors constitued a "taking" as opposed to a mere use of the common area property, such action could only have been authorized by a unanimous resolution, approving an amendment to the association's declaration. In deciding for the aggrieved unit owner, the Court held:

> "As erecting fixed objects on common areas does constitute a taking of property the subject of the undivided interest of all unit owners, it is proper to require unanimous approval of such a change. To do otherwise would allow unit owners in control of 76% of the voting power to take common area from those with 24% of the voting power through amendment of the declaration."[9]

In the case of Re York Condominium Corp. No. 42 and Melanson,[10] the Court was faced with a similar situation, but in the York case the majority had improperly enacted a bylaw the subject matter of which was

---

9. Supra n. 8 at 703.
10. (1976) 9 O.R. (2d) 116.

oppressive to a unit owner and was beyond the corporation's power. The facts were that by virtue of Section 10(1)(b) of the Act, a corporation could enact bylaws "governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units". Pursuant to this provision, the plaintiff corporation enacted by a majority decision, a bylaw which stipulated that "no animal shall be allowed upon or kept in or about the property". The defendant who was the owner of one of the units was directed by the corporation to remove his dog from the condominium complex.

In deciding that the bylaw was ultra vires the power of the corporation, Howland, J.A. stated:

> "The owners of 66 2/3% or more of the common elements may wish to pass a bylaw to protect themselves against unreasonable interference by way of vicious, malodorous, dirty or noisy animals, or pollution of the common elements. However, the prohibitive paragraph in question goes far beyond the limited powers in s. 10(1)(b) to govern the use of units and would have the effect of prohibiting animals in or about the units which could not be the cause of unreasonable interference. In my view the prohibitive paragraph in question, in so far as it governs the use of units, is beyond the powers of the corporation."[11]

In Alberta, if a unit owner feels that a bylaw was improperly enacted, he has one of two courses of action available under the Act, depending upon what interest in the project was affected. If the bylaw refers solely to the common property, the aggrieved unit owner can invoke Section 20(3)(b) of the Act and seek injunctive relief against the corporation. If the bylaw refers to the unit property or the unit and the common property, however, the aggrieved unit owner may rely on or invoke Section 29 of the Act and require the corporation to prove that the bylaw was properly enacted.

---

11. Supra n. 10 at 123.

The provisions of Section 29 are as follows:

29(1) If an owner, tenant or other person residing in a residential unit contravenes a bylaw, the corporation may take proceedings under Part 4 of the Provincial Court Act to recover from the owner or tenant or both a penalty of not more than $200 in respect of that contravention.

(2) In an action under subsection (1), the corporation must establish to the satisfaction of the provincial judge hearing the matter that

(a) the by-law was properly enacted, and

(b) the by-law was contravened by the owner, tenant or other person residing in the residential unit.

(3) On hearing the matter, the provincial judge may

(a) give judgment against the defendant in the amount being sued for or any lesser amount as appears proper in the circumstances, or

(b) dismiss the action,

and make an award as to costs as appears proper in the curcumstances.

(4) A corporation may not commence an action under this section unless it is authorized by bylaw to do so.

(5) For the purposes of subsection (2)(a), a copy of a bylaw that is certified by the Registrar as being a true copy of the bylaw filed at the Land Titles Office is prima facie proof

(a) of the contents of the bylaw, and

(b) that the bylaw was properly enacted.

(6) The commencement of an action against a person under this section does not restrict, limit or derogate from a remedy that an owner or the corporation may have against that person.

Section 29 is concerned with the enforcement of the bylaws and for a unit owner to take advantage of this Section he merely has to ignore the bylaw. If the corporation takes action under Section 29 as a

preliminary requirement to the obtaining of a judgment, "the corporation must establish to the satisfaction of the provincial judge hearing the matter that the bylaw was properly enacted". By virtue of Section 29(5)(b) of the Act, "a copy of a bylaw that is certified by the Registrar as being a true copy of the bylaw filed at the Land Titles Office is prima facie proof that the bylaw was properly enacted." To rebut this presumption, the unit owner would have to adduce evidence which would prove that although the subject bylaw had been properly registered, it had been improperly enacted for one of the previously mentioned reasons.

V. UNREASONABLE OR OPPRESIVE BYLAWS

Although a bylaw may fulfill the legal requirements, it still may be considered as being unreasonable or oppressive to a minority of the unit owners. Presently in Alberta, the Act does not require that a bylaw be reasonable or unoppressive and it is yet to be determined whether the Courts will read into the statute a standard of reasonableness. In certain jurisdictions, such a standard is required.

A. United States

In some of the American states, the Courts in certain jurisdictions have held that a bylaw has to be reasonable if it is to be enforceable.[12] In the case of Hidden Harbour Estates, Inc. v. Norman,[13] Downey, J. stated the attitude of the Court as follows:

> "Certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable the association

---

12. See generally, V. Henderson, "Community Living Condominium Style: Bed of Roses or Bed of Thorns?" (1979), 6 U.W.L.A. Law Rev. 121.
13. (1975) 309 So. (2d) 180.

> can adopt it, if not, it cannot...Of course this means that each case must be considered upon the peculiar facts and circumstances thereto appertaining."[14]

B. Ontario

There is an express requirement of reasonableness in the Ontario Act. Section 28(4) of the Act stipulates that, "the bylaws shall be reasonable and consistent with this Act and the declaration". Unfortunately, the Ontario Courts have yet to determine what form of bylaw would be considered as being unreasonable but as the majority of the judicial pronouncements on the subject of the condominium concept are American and as the Ontario Courts have in the past cited American cases as authorities for the resolution of legal problems which concern the condominium concept, it is suggested that the Ontario Courts will adopt the American test as to reasonableness.[15]

C. British Columbia

In British Columbia, the legislature has not statutorily entrenched within its condominium legislation a term that the bylaws be reasonable. However, it has provided the means for preserving the rights of the minority from unwarranted acts of oppression by the majority. Under the British Columbia Act, if a unit owner is being unduly oppressed by either the corporation, the board, the owners, or a class of owners, such an individual can seek judicial redress under Sections 42 and 43 of the Act. Sections 42 and 43 read as follows:

> 42 An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges
>
> (a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are

---

14. Supra n. 13 at 182.
15. Supra n. 10 at 123 where Howland J. A. quotes American case law as authoritive of the nature of the condominium concept.

being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done, or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

43 On an application to court under section 42, the court may make the interim or final order it considers appropriate, and, without limiting the generality of that power, may

(a) direct or prohibit an act of council or vary a transaction or resolution, and

(b) regulate the conduct of the corporation's future affairs.

The remedies provided by Sections 42 and 43 can only be resorted to by an aggrieved unit owner if the conduct alleged is "oppressive" or "unfairly prejudicial". Unfortunately, the Act does not define what form of conduct would constitute a valid reason for the judicial intervention of the Court and there have been no cases on these Sections before the Courts of British Columbia. However, Section 42 has its counter part in Section 221 of The British Columbia Companies Act[16] which, aside from the terminology employed, is identical to Section 42. Section 221 has undergone such judicial clarification. In the case of Diligenti v. RWMD Operations Kelowna Ltd.,[17] the Court had an opportunity to consider the definition and application of the phrases "oppressive" and "unfairly prejudicial" as those phrases are used in Section 221. In the Diligenti case, Fulton J., held that "prejudicial" means "detrimental or damaging" and cited the Oxford dictionary as authority for such definition.[18] Further, he concluded that the dictionary definition supported his "instinctive reactions that what is unjust and inequitable is also unfairly prejudicial."[19] In ascribing a definition to the meaning of "oppressive", Fulton J. chose to follow the

---

16. S.B.C. 1973, c. 18.
17. (1976) 1 B.C.L.R. 36.
18. Supra n. 17 at 46.
19. Supra n. 17 at 45-46.

dictionary definition of "oppressive" which had been adopted by Visount Simonds in the case of Scottish Co-operative Wholesales Society v. Meyer,[20] where it was held to mean, "burdensome, harsh and wrongful".[21]

As the remedial provisions contained in Section 42 and Section 221 are similar, the judicial analysis of Section 221 in the Diligenti decision is relevant for the purpose of understanding the meaning of Section 42. Firstly, the oppressive and unfair prejudice must affect the rights and interests of the applicant qua unit owner and not his rights and interests qua office holder in the strata corporation or as a member of the council.[22] Secondly, under Section 221(1)(a)(Section 42)(a)), the phrase "the affairs...are being conducted" would seem to refer to conduct of a continuous nature.[23] Thirdly, Section 221(1)(b) (Section 42)(b)) merely states "some conduct" and therefore an isolated act would also qualify the bringing of an application under this Section.[24] In the event that a case does arise concerning the proper interpretation of the remedies provided in Sections 42 and 43 it is suggested that the matter will be resolved in accordance with the guidelines laid down by Fulton, J. in the Diligenti decision.

D. New South Wales

Although the Ontario and British Columbia Acts are more protective of the rights of the minority than is the Alberta Act, their respective remedial provisions are insufficient as they are either restricted in their protection or they necessitate the intervention of the Courts. In

---

20. (1958) 3 All E.R. 66.
21. Supra n. 20 at 342.
22. Supra n. 17 at 46.
23. Supra n. 17 at 44.
24. See D. J. Pavlich, The Strata Titles Act supra n. 10 of Chapter One at 146-147 for an analysis of the Diligenti decision which has provided guidance in this writing; see also, the comment on the Diligenti case by B. Slutsky in (1977) 11 U.B.C. Law Review 326.

contrast the legislature of New South Wales has foreseen the possibility of such problems arising and has consequently made adequate provision in its Act. This all inclusive remedy is contained in Section 120 of the Act which reads as follows:

> 120(1) Where pursuant to an application by any person entitled to vote at a meeting of the body corporate (including both a first mortgagee and a mortgagor of a lot) for an order under this section, the Board considers that, having regard to the interest of all the proprietors in the use and enjoyment of their lots or the common property, an amendment or repeal of a bylaw or addition of the new bylaw should not have been made or effected, the Board may order that the amendment be revoked, that the repealed bylaw revived or that the additional bylaw repealed.

1. Procedure Under Section 120

As a prerequisite to the obtaining of an order under Section 120, an aggrieved unit owner would have to first make a written application to the commissioner, specifying the grounds upon which the order sought is made and the nature of the order.[25] The role of the commissioner in such an application is to act as a liason between the applicant and the board. In such a capacity, the commissioner has no authority to adjudicate on the matter as he is bound to refer the application immediately to the board without any prior determination.[26] In its judgment, the board can overrule any majority decision which has the effect of amending or repealing a bylaw or the addition of a new bylaw but it does not have the requisite authority to compel a body corporate to enact a particular bylaw.[27] If the order sought is granted, it will, when recorded under Section 141 of the Act, have the same effect as if its terms were a bylaw and it is only subject to an order with respect thereto that is made by a superior Court.[28]

---

25. Section 100.(1) supra n. 11 of Chapter One.
26. Section 100.(3) supra n. 11 of Chapter One.
27. N. J. Moses and R. Tzannes, Strata Titles, supra n. 13 of Chapter One at 162.
28. Section 120(2) supra n. 11 of Chapter Two.

2. Effectiveness of Section 120

In terms of remedial efficiency, Section 120 of The New South Wales Act, is an effective and informal medium through which an aggrieved unit owner may challenge a decision of the majority. This legislative success is a result of the following factors: (1) the right of review is not restricted in its remedial scope to majority decisions which are without legal justification, are unreasonable or oppressive to the rights of a unit owner; (2) the relief provided can be obtained by a unit owner without the need for judicial recourse and its attendant expense and formality; and (3) such relief is as binding on all parties concerned, as if it were an order of the Court.

For these reasons, the New South Wales remedial procedure and not those of Alberta, Ontario, or British Columbia is to be considered as the more sensible approach in remedying the problems which are associated with the condominium form of living and its accompanying governing policy of majority rule. It is submitted that the Alberta legislature review the New South Wales legislation as a possible means of resolving the deficiencies which currently exist under the Alberta Act.

VI. CONCLUSION

To ensure that the rights of a unit owner in a condominium project are not unjustly impaired by the holders of a majority of the voting rights, it is essential that any enabling condominium legislation contain the necessary provisions to ensure representation and protection of a unit owner's interest in the project. In providing this representation and protection, the Alberta Act is deficient as its provisions would appear to favour the interests of the mortgagee and the majority. In order to resolve these problems it is submitted that the

Act be revised as previously suggested so as to specifically provide a unit owner with a voice in the decision making process of a project and with the right and means for challenging a majority decision.

CHAPTER IV

TORTIOUS LIABILITY IN A CONDOMINIUM PROJECT

I. INTRODUCTION

When one reviews the provisions of the Alberta condominium Act, it is easily discovered that the legislative draftsmen did not address their minds to the area of tort liability in a condominium setting. As a result of this inadvertance, the Act fails to provide the necessary guidance in resolving the problems associated with tort liability in a condominium project. In this Chapter, an endeavor will be made to point out these problems and, where possible, to suggest solutions for them.

II. EXAMPLES OF TORT LIABILITY

The unit owner like any other owner of a detached residence may be liable for torts occassioned in relation to the unit property. However, unlike the conventional owner, the unit owner as a proportionate owner of the common property is also burdened with a possible liability for torts occasioned in relation to the common property. As a result of this dual ownership the unit owner exposes himself to a number of forms of tortious liability. One writer has identified a partial list as follows:

"1. Failure to maintain common elements and appliances - for example, halls, elevators, and boilers;

2. Negligence of maintenance personnel;

3. Failure to keep workmen's compensation in effect on project employees;

4. Failure to supervise pools, playgrounds, and similar areas where children congregate;

5. Violation of statutory duties, such as multiple dwelling laws, building codes, and fire department regulations;

6. Trespass or forcible entry and detainer, where a unit owner (or his lessee) is wrongfully disturbed or dislodged;

7. Automobile accidents involving vehicles owned by the condominium;

8. Products liability, where food, beverages, or detergents are dispensed by vending machines;

9. Injuries suffered in a garage, restaurant, recreation room, health club, or other facility operated by the group;

10. Miscellaneous exposures, such as nuisance, dangerous instrumentalities, non-delegable duties, subrogation, and indemnity agreements."[1]

As the above list illustrates, the possible sources of tort liability may vary, however, due to the existence of the common property, the major area to which all of the above are related is that of occupiers' liability.[2] Occupiers' liability in Alberta is governed by the provisions of the Occupiers' Liability Act.[3]

III. OCCUPIERS' LIABILITY

An occupier under the Occupiers' Liability Act is defined as being:

1(c) "occupier" means

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and for the purposes of this Act, there may be more than one occupier of the same premises;

---

1. P. Rohan, "Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance" (1967) 32 Law and Contemporary Problems 308 at 308.
2. D. J. Pavlich, The Strata Titles Act, supra n. 10 of Chapter One at 71.
3. R.S.A. 1980, c. O-3.

In a condominium situation involving occupiers' liability, a determination of who the occupier of the common property is and, consequently, of who owes the duty of care is very difficult. As one writer states:

> "For example, who is liable and for how much, if a delivery boy intending to make a delivery to an owner, on the tenth floor and to call on a daughter of the owner on the forth floor trips on a loose tile in the entrance hall and is injured?"[4]

In the majority of cases, the role of occupier would be filled by all the unit owners or the corporation. In accordance with the statutory definition of "occupier" the unit owners would qualify as occupiers as they have the physical possession of the property; and the corporation, as it has the responsibility for the management and control of the property.

In addition to the unit owners and the corporation, the statutory definition of "occupier" would apply equally to any individual who is given the power by the unit owner to control the conditions of the unit property. These same individuals are the occupiers of the common property provided that the power of control includes the unit owner's share in the common property. Examples of this would be where a unit owner has leased his unit and the lease included the unit owner lessor's share in the common property, or where a mortgagee has foreclosed on his mortgage and taken possession of the premises.

Who is the occupier is clear; what is not made clear by either the Condominium Property Act or the Occupiers' Liability Act is (1) what is the nature of the liability of each and all of the various individuals who can be occupiers, and (2) what is the extent to which the unit owner's unit can be placed in jeopardy if a judgment is obtained?

---

4. R. C. B. Risk, "Condominiums in Canada", supra n. 2 of Chapter Three at 38.

IV. NATURE OF THE LIABILITY

A. The General Rule

Certain authors are of the opinion that in the absence of legislation to the contrary each unit owner is jointly and severally liable for tort claims arising from incidents occasioned in relation to the common property.[5] In accordance with this opinion, a plaintiff would have the discretion to commence his tort action against all the unit owners, one specific unit owner or, as is the case in Alberta where a body corporate has been created by the legislature, against the condominium corporation.[6]

At this juncture, the question to be answered is whether the legislature has altered the general rule of joint and several liability? In this respect, it would appear that the Occupiers' Liability Act favours the general rule, in that by allowing for more than one occupier, each unit owner as an occupier of the common property could be named as a party defendant and accordingly, the liability of the unit owners would be joint and several. As the Occupiers' Liability Act does not restrict a plaintiff in the naming of a defendant, any restriction imposed in alteration of the general rule, would have to be contained in the Condominium Property Act.

B. The Condominium Property Act

Under the Condominium Property Act there are no mandatory provisions which expressly dictate which party or parties shall be named as defendants in an action relating to occupiers' liability or, more

---

5. A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 7-13.
6. A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, (1962), at 36.

generally, in any tort action which relates to the common property. However, in light of the provisions which do deal with the procedure for the naming of a defendant and which do refer to the nature of the unit owner's liability, it may be argued that a statutory alteration of the general rule has been effected by the legislature.

Under the Act, the only provision which does provide some form of procedural guidance for the naming of a party defendant in a tort action which relates to the common property is Section 20(3)(b).

1. Section 20(3)(b)

Section 20(3)(b) provides that without limitation to the Condominium Property Act or any other legislation, the corporation may be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

As the unit owners could never by held jointly liable in respect to matters which relate solely to the individual unit property,[7] the joint liability must be with reference to the condominium project as a whole, or the common property where a common liability does exist.[8]

Although Section 20(3)(b) is of assistance, the language employed does not clarify the position of the corporation and the unit owners in relation to liability for tortious incidents occasioned on the common property. As one writer states:

> "It is difficult to determine from the language of the Section whether the words 'for which the owners are jointly liable' are

---

7. P. Rohan, "Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance" supra n. 1 at 308-309.
8. A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra, n. 6 at 36.

intended to qualify the rights of the corporation or whether these words imply that the owners are jointly liable with the corporation for such judgments."[9]

In reply to this query, it is suggested that a possible interpretation of the proper application of Section 20(3)(b) is as follows:

(1) By the use of the word "may", the provision under Section 25(2)(c) of the Interpretation Act,[10] is to be "construed as permissive and empowering." If the word "shall" was used, the provision would be "construed as imperative" under Section 25(2)(e) of the Interpretation Act. As the provision is not imperative, the liability of the unit owners is not removed and an action could be commenced against them either jointly or severally or in their corporate capacity. The provision can therefore be assumed as merely qualifying the right to sue the corporation.

(2) The words "for which the unit owners are jointly liable" are merely descriptive of the property for which the unit owners are jointly liable.

(3) As the corporation is a separate and distinct legal entity apart from the unit owners, its liability is separate and a judgment against the corporation could not be considered as constituting a judgment against the unit owners. Accordingly, the unit owners could never be held jointly liable with the corporation in an action commenced by way of Section 20(3)(b).[11]

2. Other Sections and Nature and Extent of Liability

Because the Alberta Courts have yet to interpret Section 20(3)(b), it cannot be conclusively stated that the legislature has effected a statutory alteration of the general rule. However, from certain provisions in the Act which refer to the nature and extent of the unit

---

9. A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 12-12.
10. Supra n. 2 of Chapter Two.
11. A. Rosenberg, Condominium in Canada, supra n. 6 at 8-5; see also, A.F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra n. 6 at 37.

owner's liability, it can be inferred that this question may be answered in the affirmative. In this respect, Section 5 of the Act has the effect of limiting the personal liability of the unit owners to such a degree that one particular unit owner could never be held solely accountable for a judgment which relates to the common property. Section 5 reads as follows:

> 5 Except to the extent that an interest endorsed on a certificate of title relates to that particular unit, the owner of the unit is only liable in respect of that interest in proportion to the unit factor for his unit.

In light of this provision, a plaintiff, would be forced into suing all the unit owners, in order that the judgment would be totally satisfied. Such limitation may deter a plaintiff from singling out one specific unit owner. Accordingly, it may be inferred that the legislature intended to alter the general rule to the extent that the unit owner's personal liability would be joint but not several. In furtherance of this proposition, the nature of the liability of the unit owners vis-a-vis the common property is expressly stated in Section 20(3)(b) as "jointly liable". By the employment of this language, it may be argued that if the legislature intended to hold the unit owners jointly and severally liable, it could have easily stated so and in this respect, in Section 31(2) of the Act, the legislature has expressly defined the liability of the parties as "joint and several".

Again, however, neither of the above referred to provisions have been judicially considered by the Alberta Courts and owing to this lack of judicial interpretation, it is still open to debate as to whether or not the general rule has been altered by the legislature. It is therefore suggested that until such times as there is legislative or judicial clarification, a plaintiff in an action concerning the common property would be well advised to commence the action against all the unit owners individually and collectively as the corporation.

V. THE EXTENT OF THE LIABILITY AND THE SATISFACTION OF A JUDGMENT

Assuming that the general rule of joint and several liability is still applicable, an action involving tortious injury sustained in relation to the common property could be maintained against one specific unit owner, all the unit owners or the corporation.

A. The Unit Owners

In the event that a plaintiff were to proceed solely against one specific unit owner, the full satisfaction of his judgment might be hampered by Section 5 of the Act. As mentioned previously, Section 5 limits a unit owner's liability to an amount which is "in proportion to the unit factor for his unit". In view of Section 5, a judgment creditor could never obtain full satisfaction of a judgment by proceeding against one specific unit owner. However, if the action were brought against all the unit owners, Section 5 would not prove to be a bar to a full recovery of a judgment. In this sense, a judgment could be satisfied by the traditional means of seizure of chattels and garnishment proceedings, to the full extent that each unit owner is personally liable. If these methods were not sufficient to satisfy the judgment, the judgment creditor could obtain a Writ of Nulla Bona and proceed further to satisfy his judgment by execution against the real property of all the unit owners.

From the viewpoint of the judgment creditor, execution proceedings against the individual unit owners might prove to be a viable method of satisfying the judgment but from the unit owner's standpoint such proceedings may create problems. The problems associated with such proceedings stem from the fact that the Writ of Execution will represent the full amount of the judgment and not a proportion of the judgment.

Given this fact, what is the position of a unit owner who has the necessary funds to pay his proportionate share of the judgment? If a unit owner wished to clear his title from an encumbering Writ, could he obtain a partial discharge of the Writ by merely paying his proportionate share into Court? Conversely, would a judgment creditor be within his rights to refuse a proportionate payment and demand the full amount of the judgment?

The above questions are not answered by the Condominium Property Act but certain provisions in the Execution Creditors Act[12] and the Land Titles Act[13] may be of assistance. In this respect, Section 28 of the Execution Creditors Act reads as follows:

> 28. If (a) an execution creditor
>
> (i) receives any money on account of an execution debt,
>
> (ii) receives anything by way of satisfaction, either wholly or in part of an execution debt, or
>
> (iii) enters into an agreement whereby proceedings under a Writ of Execution are to be stayed or suspended, or
>
> (b) an order is made staying the execution,
>
> the execution creditor shall immediately thereafter deliver to each Sheriff to whom the Writ of Execution has been delivered a notice in writing setting out with particularity each payment, satisfaction, or agreement or a certified copy of each order, as the case may be.

Further, Section 123 of the Land Titles Act provides that:

> 123 On the satisfaction or withdrawal from his hands of any Writ, the Sheriff or other duly qualified officer shall on payment to him of his proper fee forthwith transmit to the Registrar a certificate under his official seal, if any, to that effect, and on the production and delivery to the Registrar of the certificate, or of the Judge's Order, showing the expiration,

---

12. R.S.A. 1980, c. E-14.
13. R.S.A. 1980, c. L-5.

> satisfaction or withdrawal of the Writ as against the whole or any portion of the lands so bound, the Registrar shall make a memorandum on the certificate of title to that effect if the land has been brought under the provisions of this Act, and, if not, on or opposite to the entry of the Writ in the execution register, and thenceforth the land of the debtor or portion of land, as the case may be, shall be deemed to be absolutely released and discharged from the Writ.

The combined effect of these Sections is that they recognize the fact that a judgment creditor and a judgment debtor may negotiate for a partial discharge. However, they do not expressly provide that a judgment creditor must give a partial discharge. In a situation where a judgment creditor refused to give a partial discharge, a unit owner might be able to acquire a partial discharge by obtaining an order from the Court to that effect under Section 180(1) of the Land Titles Act. Section 180(1) reads as follows:

> 180(1) In any proceeding respecting land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorandum or entry affecting land, the judge by decree or order may direct the Registrar to cancel, correct, substitute, or issue any duplicate certificate or make any memorandum or entry thereon or on the certificate of title and otherwise to do every act necessary to give effect to a decree or order.

Unfortunately, the exact nature of the power of the Court under Section 180(1) has yet to be judicially clarified.[14] However, assuming

---

14. In the case of Nova Holdings Ltd., v. Western Factors Ltd. and Bird Construction Ltd. (1965) 51 W.W.R. 385, MacDonald J. A. in determining the proper application of Section 180(1) stated at 389-392: "The power to rectify the register is, in my opinion, just part of the power that is granted to the Court under Section 180(1). I have no doubt that Section 180 grants power to a Court, respecting proceedings within the purview of that Section, to direct the Registrar to cancel an existing certificate of title and issue a new certificate. Pursuant to Section 122 of the Land Titles Act the execution binds only the interests of the execution debtor. However the interest of the debtor in the lands was a fair value of the lands. As the money representing such fair value is being paid into Court, the money replaces the lands as far as the execution is concerned.". For an opposite view see Re Finley (1977) 7 A.R. 26.

that the Court has the requisite power under Section 180(1) to provide a unit owner with a partial discharge, it is suggested that a Court faced with such an application would grant the relief requested. This suggestion is based on the fact that as a unit owner's liability is limited by Section 5 of the Condominium Property Act, a judgment creditor's rights under a Writ of Execution against a unit owner would also be limited. In this respect, Section 122(2) of the Land Titles Act specifically states that a certificate of title is, "...subject to the rights of the execution creditor under the Writ...". Given this factor of limited liability, a judgment creditor's rights under a Writ of Execution would be limited against the unit owner to a proportionate share of the total judgment.[15] As a judgment creditor could never obtain the full satisfaction of a judgment against one specific unit owner, his rights would not be impaired if the unit owner were granted a partial discharge in return for payment into Court of the proportionate share of the judgment. In such a case, the judgment creditor could still proceed against the other unit owners for their proportionate shares.

Although Section 180(1) would appear to provide the Court with the requisite authority to give a partial discharge, such an application within a condominium context has never been dealt with by the Alberta Courts. In this respect, until such times as there is judicial clarification, a judgment creditor may be within his rights to refuse to grant a partial discharge.

B. The Corporation

If a plaintiff should choose to proceed against the corporation, the satisfaction of a judgment could be achieved in a number of ways.

---

15. A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 8-5.

1. Registration of a Writ of Execution

Firstly, a judgment creditor could register a Writ of Execution against the condominium plan at the Land Titles Office. The provision for allowing such registration is contained in Section 69 of the Condominium Property Act which reads as follows:

> 69 If a judgment is obtained against a corporation, a Writ of Execution in respect of it may be registered against the condominium plan.

By virtue of Section 2(3) of the Act, "for the purposes of the Land Titles Act, a condominium plan shall be deemed upon registration to be embodied in the register".[16] Unfortunately, as the condominium plan is not representive of the certificates of title to the unit and common property comprised in the project, the effect of Sections 69 and 2(3) would be of little assistance to a judgment creditor except to the extent that the registration would provide notice to the public that a judgment has been awarded against the corporation.

2. Execution Proceedings

Although the registering of a Writ of Execution against the condominium plan may prove futile, a judgment creditor may still maintain execution proceedings against the real and personal property of the corporation. The right of the corporation to own real property is provided in Section 30(3) of the Act and the right to own personal property is contained in Section 3(a) of Appendix 1. A further source of attachable property is the fund which the corporation establishes under Section 31(1)(a) of the Act. This fund is vested in the corporation and execution could issue against it.[17]

---

16. For an analysis of Section 2(3), see A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra n. 6 at 11.
17. A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra n. 6 at 36.

3. Indirect Methods

Although there is no provision in the Act for enforcing against the owners a judgment obtained solely against the corporation, a judgment creditor may indirectly force the owners to discharge a judgment against the corporation.[18] This payment by the owners on behalf of the corporation may be accomplished in two ways.

(a) Seizure

Firstly, by effecting seizure of all the assets of the corporation, the judgment creditor could probably paralyze the management of the project by continuing to assert his claim against such assets. Faced with such a situation, the owners would have a choice between payment of the judgment or a complete termination of the condominium status.[19]

(b) Levying a Contribution

The second method of obtaining payment by the owners is again the result of the continuing assertion by the judgment creditor of his judgment through seizure of the corporation's assets. By such assertion, the judgment creditor may be in a position to compel the corporation to raise the necessary funds by the levying of a contribution against all the unit owners. Although there is no specific provision in the Act requiring the corporation to raise money for the purpose of satisfying a judgment, it may be argued that the discharging of a judgment is an obligation of the corporation and, accordingly, the

---

18. A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra n. 6 at 36.
19. R. C. B. Risk, "Condominiums in Canada", supra n. 2 of Chapter Three at 37.

corporation by virtue of Section 31(1) has the power to levy contributions for the purpose of discharging such an obligation.[20] In this respect Section 31(1) reads as follows:

> 31(1) In addition to its other powers under this Act, the powers of a corporation include the following:
>
> (a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any obligation of the corporation;
>
> (b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);
>
> (c) to raise amounts so determined by levying contributions on the owners in proportion to the unit factors for the respective units;
>
> (d) to recover from an owner by an action in debt any sum of money spent by the corporation
>
> (i) pursuant to a by-law, or
>
> (ii) as required by a local authority or other public authority,
>
> in respect of the unit or common property that is leased to that owner under section 41.

Assuming that a judgment is an obligation of the corporation and that, therefore, the corporation has the requisite authority to levy a contribution against the owners, what is the possibility of such a levy becoming a reality? With respect to this question, any contribution levied in accordance with Section 31(1) must first have been approved by a resolution of the board of managers. Unfortunately, the Act does not specify what type of majority is required to effect the passage of such a resolution. In this sense, the necessary majority could be ordinary, special or unanimous and in the absence of a special

---

20. A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra n. 6 at 36.

provision in the Act or the bylaws, the type of majority is open to question.[21] This factor is of importance when one considers that the board of managers is usually composed of unit owners. In the event that the amount of the levy was extraordinarily large, the members of the board, as unit owners, might be reluctant to pass the resolution imposing a levy. Such reluctance could possibly frustrate the passage of the resolution if a unanimous or special majority were required. Conversely, if an ordinary majority were required, the possibility of a resolution being passed will be greatly enhanced.

If a resolution were to receive approval by the board, what is the position of those unit owners who refuse or are unable to pay the levy? In a situation where a levy remains unpaid, the corporation would have two courses of action available. Firstly, the corporation could sue the defaulting owner in debt and, secondly, it could file a caveat against the owner's property in the project and foreclose on the caveat as it would a mortgage.[22] If the amount levied were insignificant, it is probable that the corporation would be able to obtain the necessary funds by voluntary payment or by an action in debt or the caveat procedure. In the majority of cases, a unit owner faced with the reality of such judicial proceedings would inevitably pay the levy. However, if the levy were extraordinarily large, it is improbable that the board would test the proceedings to the point that the owner's property in the project would become subject to sale. This reluctance is again attributable to the composition of the board where such proceedings may adversely affect the board members personally, if they or friends or relatives were defaulting owners. Given a situation where the levy could not possibly be paid by a majority of the unit owners, it would be improbable to expect the owners themselves to compel a sale under such circumstances.

---

21. See Section 12(1) and Section 13 of Appendix 1, supra n. 1 of Chapter One; see also, A. F. Rath, P. J. Grimes, J. E. Moore, Strata Titles, supra n. 6 at 34.
22. See Section 31(2)(4)(6) supra n. 1 of Chapter One.

In view of the fact that most tort judgments are of a significant amount, the reluctance of the unit owners to pay or enforce payment of a levy may result in a total frustration of the levy method as a means of satisfying a judgment.[23] The blame for such an occurence must rest with the drafters of the Act, for as one writer states:

> "It seems reasonable to assume that the association would not foreclose against the unit owners. The source of the problem is that most statutes are directed at common expense assessments of relatively moderate amounts...unfortunately, the statutory draftsmen in most states simply did not contemplate the possibility of massive tort judgments."[24]

VI. OTHER JURISDICTIONS

The majority of the problems associated with tortious liability in a condominium scheme would appear to stem from the common ownership of the common property and the application of the general rule of joint and several liability. As is the case in Alberta, these problems still remain unresolved both in Canada and elsewhere, but certain jurisdictions have formulated note worthy solutions.[25]

A. Occupiers' Liability

In terms of determining and apportioning liability, the area of occupiers' liability may well prove the most problematic. As the corporation and each and every unit owner could be considered as occupiers of the common property, a plaintiff would be within his rights to bring an action against one or all of these occupiers. By reason of this factor, an application of the general rule would in all probability

---

23. See Andrews v. Grand and Toy Alberta Ltd. (1978) 83 D.L.R. (3rd) 852 Thornton, Tanner v. School District No. 57 (1978) 83 D.L.R. (3rd) 480 and Arnold v. Teno (1978) 83 D.L.R. (3rd) 609.
24. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal" (1969-70) 23 Vanderbilt Law Review 321 at 347.
25. A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 7-13.

frustrate any equitable outcome. In order to alleviate such an inequity, certain jurisdictions have specifically provided in their condominium legislation, "...that for the purpose of determining liability resulting from the breach of duties of an occupier, the corporation and not the owners, is deemed to be the occupier of the common elements.".[26]

1. Ontario

In this respect, the Ontario[27] provision reads as follows:

> 7(12) For the purposes of determining liability resulting from breach of duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be the occupiers of the common elements.

In terms of the general rule of joint and several liability, it is clear that in the context of occupiers' liability, the Ontario and like provisions have eliminated such an application by statutorily providing that in an action involving occupiers' liability in relation to the common property, only the corporation can be named as the party defendant.

B. General Rule

However, the area of occupiers' liability is but one of many forms of tortious liability that the unit owners can be susceptible to and in these other areas, the general rule would still apply. In recognition of this problem, certain jurisdictions have attempted to alter the general rule by providing that the corporation as a representative of

---

26. For a discussion of this form of provision see A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 7-13.
27. Supra n. 19 of Chapter Two.

all the unit owners, may be charged with defending a tort action relating to the common property.[28]

1. New South Wales

The provision contained in The New South Wales Act[29] which amply illustrates this procedure reads as follows:

> 147(1) Where the proprietors of the lots the subject of a strata scheme are jointly entitled to take proceedings against any person or liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to the common property), the proceedings may be taken by or against the body corporate and any judgment or order given or made in favour of or against the body corporate in any such proceeding shall have the effect as if it were a judgment or order given or made in favour of or against the proprietors.

Although the New South Wales and analogous provisions do provide for the corporation to defend in a representative capacity an action relating to the common property, it would appear that such legislation has not expressly eliminated the general rule but instead it has limited its application in such a manner that a plaintiff could only commence the action against all of the unit owners jointly.

2. United States

In this respect, certain American jurisdictions have reached this degree of elimination by expressly providing in their condominium legislation that in any judicial proceedings involving tortious incidents occasioned in relation to the common property and facilities,

---

28. See Section 7(12) of Ontatio's condominium Act, supra n. 19 of Chapter Two; Section 147(1) of the New South Wales condominium Act, supra n. 11 of Chapter One; and Section 15(1)(b) of the British Columbia condominium Act, supra n. 24 of Chapter Two.
29. Supra n. 11 of Chapter One.

only the corporation can be named as the party defendant. The state of Alaska[30] for example, has enacted this provision:

> 34.07.260.(b) A cause of action relating to the common areas and facilities for damages arising out of tortious conduct shall be maintained only against the association of apartment owners and a judgment, lien or charge is a common expense. This judgment, lien or charge is removed from an apartment and its percentage of undivided interest in the common areas and facilities upon payment by the respective owner of his proportionate share based on the percentage of undivided interest owned by him.

Although a complete statutory elimination of the general rule is welcome, in effecting such elimination, provision must be made to ensure that a plaintiff will not be prejudiced in the satisfaction of his judgment. In an endeavor to accomplish such results, certain jurisdictions provide that a judgment against the corporation is to be considered as a common expense to be borne proportionately by all the unit owners.[31] Alternatively, certain other jurisdictions have provided that a judgment against a corporation is to be considered as a judgment against each individual unit owner.[32] In light of the fact that if a judgment were considered as a proportionate common expense, a judgment creditor would have no direct means for ensuring the carrying out of a levy to satisfy this common expense, the better view would be to hold that such a judgment was a judgment against all the unit owners. However, to ensure that one specific unit owner is not forced into satisfying the judgment completely, the judgment should be deemed as proportionate to a unit owner's share in the common property.[33] Further, to alleviate any problems which would arise in the discharging of such a proportionate judgment, provision for the removal of the judgment must be provided.[34]

---

30. Property, Alaska Statutes, 1975, 34.07.
31. See Section 34.07.260(b), supra n. 30 and Section 15(2), supra n. 24 of Chapter Two.
32. Section 147.(1), supra n. 11 of Chapter One.
33. Section 34.07.260, supra n. 30.
34. Section 34.07.260, supra n. 30.

3. Model Provision

To date there is no existing provision in Canada or elsewhere which adequately resolves the problems associated with occupiers' liability, the application of the general rule, or the satisfaction and discharging of a judgment. In this respect, a model provision might read as follows:

> 1(a) A cause of action relating to the common areas and facilities for damages arising out of tortious conduct shall be maintained only against the corporation and any judgment or order given or made in favour of or against the corporation in any such proceedings shall have the effect as if it were a judgment or order given or made in favour of or against the unit owners. A judgment will cease to bind a unit and its percentage of undivided interest in the common property upon payment by the respective owner of his proportionate share based on the percentage of undivided interest owned by him.
>
> (b) In particular and without limiting the generality of subsection (a), for the purposes of determining liability resulting from breach of duties of an occupier of land, the corporation shall be deemed to be the occupier of the common property and the owner shall be deemed not to be the occupier of the common property.[35]

In order to resolve the problems which can arise in a condominium project concerning tortious injuries sustained in relation to the common property, it is suggested that the Alberta legislature review the above model provision as a possbile means in obtaining such resolution.

VII. IMMUNIZATION FROM LIABILITY

As mentioned previously, the Courts are currently awarding plaintiffs large sums of money as damages for tortious injuries. This being the case, there is a definite need for preserving the unit owners from any personal liability which can arise in relation to the common

---

35. This model provision is a hybrid of the Ontario, New South Wales, and Alaska provisions; see also, A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 7-13.

property or facilities. To date, there have been developed three methods for accomplishing a complete immunization of personal liability. These methods are: (1) statutory immunization, (2) incorporation, (3) compulsory and adequate liability insurance.

A. Statutory Immunization

In terms of convenience, a complete immunization of liability could easily be accomplished by merely providing in the enabling statute that the unit owners are exempt from liability relating to the common property or facilities. However if this were the case, it may have the effect of providing an unwarranted bonus to condominium owners and in this respect, the majority of jurisdictions which have legislated on this subject, have fallen short of providing complete immunity. In the majority of situations, instead or providing complete immunity, the statute either limits the liability of a unit owner to a proportionate share of a judgment or it merely postpones the liability. The Alberta provision is a prime example of the former and with respect to the latter, the provision contained in the Massachusets statute[36] provides an illustrative example.

1. Massachusets

In this respect, the Massachusets provision reads as follows:

> 13 All claims involving the common areas and facilities shall be brought against the organization of the unit owners, and all attachments and executions related to such claims shall be made only against common funds or property held by the organization of the unit owners and not against the common areas and facilities themselves. After such common funds and property have been exhausted, individual unit owners shall be liable for the balance due, if any, provided, however, that the amount for which a unit owner is liable shall be limited to a sum equal to the amount of his percentage interest in the common areas and facilities times the balance due.

---

36. Condominiums, Annotated Laws of Massachusets, 1977, C. 183 A.

It would appear that the primary concern of the drafters of this form of legislation was to curtail the effects of a judgment upon the unit owners in the hope that the assets of the corporation would be sufficient to satisfy the judgment. However, as the corporation seldom owns any real property and has no ownership in the common property, a judgment creditor would be restricted to satisfying his judgment out of the personal property of the corporation. As a corporation's personal property usually consists primarily of its maintenance equipment, it is doubtful that such property would be of sufficient value to satisfy the claim.[37] With regards to the common fund, this fund is usually minimal, containing only the necessary funds to enable the condominium project to function on a day to day basis. Further, problems may arise procedurally in determining the extent that a judgment creditor must proceed in complying with the statute. Must a judgment creditor proceed against the assets of the corporation until every possible asset, regardless of value, has been exhausted? If the corporation were in receipt of rent concerning the common property, such rent would become part of the common fund and if it were paid monthly, the duration of the time that it could take to satisfy a judgment might be ludicrous. Ultimately though, once a judgment creditor has exhausted all of the corporation's resources, he would be in a position to proceed directly against the unit owners and in this respect, the liability has not been limited but merely postponed.

2. New Jersey

From a review of the various legislation, it would appear that the closest form of complete statutory immunity has been provided by the legislature of New Jersey.[38] In this respect, the New Jersey provision reads as follows:

---

37. "Recent Cases: Torts - Condominiums - Condominium unit owner has standing to sue unincorporated unit owner's association for injuries inflicted because of the association's negligence", (1972) 25 Vanderbilt Law Review, 271 at 278.
38. Property, New Jersey Statutes, 1979, 46:8B.

46:8B-16.(c) A unit owner shall have no personal liability for any damages caused by the association or in connection with the use of the common elements. A unit owner shall have no personal liability for any damages caused by the association or in connection with the use of the common elements. A unit owner shall be liable for injuries or damages resulting from an accident in his own unit in the same manner and to the same extent as the owner of any other real estate.

As appealing as this provision may appear, it does not completely immunize the unit owner from liability but merely places the liability on the shoulders of the corporation which in turn could re-impose the liability on the unit owners by the levying of a contribution to satisfy the judgment. The unit owners would therefore not be exonerated from liability, their liability would simply be re-routed through the corporate medium. As one writer states:

> "Thus viewed, a unit owners exposure is not non-existant, but limited to the extent of his aliquot share of the levy (including loss of his unit if he does not meet the levy)."[39]

Although there are a number of statutory schemes which endeavor to provide immunity, they are either too narrow in application or they have disguised the liability. Even if a provision could be drafted which would effect a complete immunity, it might be argued that in terms of the plaintiff's position and the satisfaction of a judgment, such a provision would only result in an injustice to a plaintiff.[40] In this respect, if such a provision were enacted, how would a plaintiff satisfy his judgment if the corporation's assets were not sufficient? It seems inequitable to provide one member of society with a benefit by allowing for such a benefit at the expense of another. It is therefore suggested that until such times as this question of principle is resolved, a complete immunization through statute should not be resorted to as a

---

39. P. Rohan and M. Reskin, Condominium Law and Practise, (1965) at 10A-9.
40. P. Rohan and M. Reskin, Condominium Law and Practise, supra n. 39 at 10A-18.

means of safeguarding the unit owners from tortious liability relating to the common property and facilities.

B. Incorporation

Certain commentators are of the view that, "by forming a corporation...to operate the condominium, unit owners probably can avoid unlimited personal liability."[41] In terms of incorporation, there are two forms, the corporation created by the condominium statute and the corporation created by the corporate legislation.

1. Condominium Act Incorporation

In Alberta, the condominium statute specifically requires incorporation under the Act.[42] This form of incorporation can be distinguished from the type of corporation created under the Business Corporations Act[43] in that the statutory condominium corporation derives its origin solely from the Condominium Property Act. As mentioned previously, any application of the corporate legislation is specifically excluded by the Condominium Property Act.[44] The major drawback to this form of incorporation lies in the fact that there is no share capital with its accompanying limitation of liability. As is the case in Alberta, any limitation of the unit owner's liability must be provided for by the enabling statute and to date, such limitation is not total but merely for a proportionate share based on the ownership in the common property.

An additional drawback to this form of incorporation may be attributed to the fact that the corporation's primary purpose is to

---

41. C. Berger, "Condominium Shelter on a Statutory Foundation", supra n. 30 of Chapter Five.
42. Section 20(1), supra n. 1 of Chapter One.
43. Supra n. 4 of Chapter Two.
44. Section 20(4), supra n. 1 of Chapter One; see also, supra n. 4 of Chapter Two.

provide management convenience. This factor may cause the corporation to be viewed as the alter-ego of the unit owners. In such a situation, "the basic principle upon which liability is predicated in the event of a suit against the association or unit owners focuses upon the liability of a principle for the activities of his agent."[45] It would seem logical to assume that the Courts would pierce the corporate veil and impose liability upon the unit owners in cases where the corporation has no substantial assets.[46]

2. Incorporation By Corporate Legislation

The second form of incorporation, that under the corporate legislation, has a certain amount of appeal which makes it more desirable than the condominium form. This appeal stems from the fact that the incorporation would provide for share capital and, accordingly, the accompanying limitation of liability. However, to avoid the principle-agent problem, the corporation would have to have a substantial amount of assets in its own right and presumably, such assets could be the common property and facilities. As one author states:

> "Numerous unsuccessful statutory attempts have been made to deal with this problem within the framework of the prinicpal-agent relationship. It is submitted that the problem could best be solved by altering this relationship through the creation of a separate legal entity with sole responsibility for the operation and management of the common elements; namely a corporation which owns the common elements as its principal asset."[47]

---

45. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal", supra n. 24 at 338; see also, A. Rosenberg, Condonminium in Canada, supra n. 6 of Chapter One at 8-5, and R.C.B. Risk, "Condominiums in Canada", supra n. 2 of Chapter Three at 37.
46. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal", supra n. 24 at 330.
47. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal", supra n. 24 at 338.

3. Implementation

Unfortunately, the implementation of such a scheme of incorporation within the framework of the condominium regime would appear to have its problems. The major problem surrounding such incorporation is whether or not it will accomplish its purpose of safeguarding the unit owners from liability?[48] On this subject, there is a divergence of opinion among legal scholars as to whether or not such incorporation would completely eliminate the stigma of principal-agent. The affirmative views of one commentator have already been given and with respect to the opposing view, one writer states:

> "The major drawback to incorporating, however, is that it may not accomplish its purpose. If a corporation is formed to operate and manage a condominium, it would, in reality, be an agent for the owners. Courts might pierce the corporate veil and hold the owners liable as principals. Although courts have not usually done this in the absence of underhandedness on the part of the stockholders, it is a sufficient possibility to cause many authorities concern."[49]

Although there is a certain amount of disagreement as to whether or not such incorporation is viable in terms of eliminating liability, the majority of commentators are of the opinion that to implement such a scheme of incorporation, the condominium framework would have to be drastically altered. In this repsect, it is arguable whether or not such incorporation is warranted, especially when the same results can be obtained by less stringent and radical measures.[50]

---

47. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal", supra n. 24 at 338.
48. Lawrence, "Tort Liability of a Condominium Unit Owner", (1974) 2 Real Estate Law Journal 789 at 802.
49. Lawrence, "Tort Liability of a Condominium Unit Owner", (1974), 2 Real Estate Law Journal, supra n. 48 at 802.
50. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal", supra n. 24 at 329; see also, M. Brown, "Living in a Condominium! Individual Needs Versus Community Interests", (1977-78) 46 University of Cincinnati Law Review 523 at 535.

C. Liability Insurance

From a practical viewpoint, it would seem that the most efficient method of immunizing the unit owners from tort liability relating to the common property and facilities is for the enabling statute to require that the corporation place adequate liability insurance on the common property and facilities.

1. Statutory Insurance Provisions

Currently, under the Alberta Act, such insurance is not compulsory but merely permissive. In this respect, Section 38(1)(a)(c) reads as follows:

> 38 A corporation
>
> (a) shall place and maintain insurance on the units, other than improvements made to the units by the owners, and the common property against loss resulting from destruction or damage caused by fire and those other perils specified in the bylaws,
>
> (c) may place and maintain insurance on the units and the common property or either of them against additional perils other than those specified in the Act or the bylaws,
>
> and for that purpose the corporation has an insurable interest in the units and the common property.

If a statutory imposition of mandatory liability insurance were to become a reality, the problems associated with the general rule of joint and several liability, the satisfaction and discharge of a judgment and the principal-agent rule would be rendered obsolete. However, in order for such a measure to be effective, the amount of the insurance coverage would have to be adequate and in line with present tort judgments because if it were not, the effect would be undermined and the unit owners would still be faced with the problems of satisfying the unpaid portion of the judgment which was in excess of the insurance coverage.

2. Implementation

Although the implementing of such a provision would appear simple and straight forward, certain problems could be encountered. For example, what property and risks would be covered against liability? Who would be the insured, how would the cost of the insurance be paid and by whom? In answer to these questions, one writer suggests:

> "Since the neglect or fault of a unit owner or of the association is imputed to every other unit owner for the purposes of tort liability, a joint liability policy would appear to be the best vehicle for protecting the members' interests. Such a master tort liability policy should include coverage for all claims for bodily injury or property damage arising out of any occurrence in connection with the use and ownership of the condominium property. As with all other operational costs, premiums would be treated as a common expense of the unit owners.
>
> The inclusive nature of the master policy, however, should not lead to the conclusion that all problem areas have been eliminated. It must be kept in mind that the persons most likely to be injured on the condominium premises are the unit owners themselves. Suits based on such injuries, either against fellow unit owners or the association, do not fit well into traditional insurance thinking. It is expected that the liability insurer might resist claims by a unit owner a named insured under the master policy. To avoid this problem, the association policy should contain specific cross-liability coverage for intramural suits of this nature. It is also important to note that master policies typically do not cover liability arising from intra-unit injuries. Intra-unit liability coverage is best acquired from the master policy carrier in conjunction with association coverage. In this way, unnecessary litigation concerning the actual site of injury, be it within the unit or the common areas, will be obviated."[51]

It is suggested that in view of the current inadequacies of the Alberta Act in safeguarding the unit owners from uncalled for liability exposure, a mandatory statutory provision covering the above mentioned problems should be devised and implemented by the Alberta legislature.

---

51. T. Hakala, "Condominium Casualty and Liability Insurance" (1974) 48 St. John's Law Review 1119 at 1120; see also, D. J. Pavlich, Strata Titles, supra n. 10 of Chapter One at 76.

VIII. CONCLUSION

In terms of legislative success, the Alberta Act is a failure with regards to the subject of tort liability in relation to the common property and facilities. This failure may be attributed to four factors:

(1) a plaintiff does not know who should be held liable for injuries sustained in connection with the common property and facilities;

(2) the exact nature and extent of the individual unit owner's liability is not clearly defined;

(3) there are no adequate provisions for the satisfaction and discharge of a judgment by either the corporation or the individual unit owners;

(4) the unit owners are not completely immunized from liability relating to the common property or facilities.[52]

It is submitted that in light of the awesome ramifications which can flow from the above mentioned problems the Alberta legislature should review the remedies suggested throughout this Chapter as a possible means of providing curative remedies for the problems associated with tortious liability in a condominium scheme.

---

52. L. C. Ashby, J. H. Bailey, "Condominiums: Incorporation of the Common Elements - A Proposal", supra n. 24 at 339.

CHAPTER V

BUILDERS' LIENS IN A CONDOMINIUM SETTING

I. INTRODUCTION

Just as many purchasers of condominium units are unaware of their potentially unlimited liability with respect to torts associated with the common property, they are also likely to be ignorant of their potential liability in connection with builders' liens registered either at the beginning or during the lifetime of the condominium project. It is the purpose of this Chapter to discuss the various problems associated with builders' liens in a condominium setting and, where possible, to suggest solutions.

II. PURCHASING A NEW UNIT

A purchaser of a new condominium unit ought to consider at least these problems:

1. The liability of a purchaser for builders' liens which are registered against his title after the date of conveyance as a result of labour or materials provided to a unit or the common property of the condominium project prior to the date of conveyance.

2. The provisions contained in the Condominium Property Act to protect a purchaser from builders' liens being registered after the date of conveyance are inadequate.

A. Purchaser's Liability After the Date of Conveyance

As mentioned previously in this Thesis,[1] once registration of a condominium plan has been effected, a separate certificate of title will

---

1. See n. 2 of Chapter One.

be issued for each unit contained in the plan. At the time of registration it is not mandatory that the property contained in the plan be substantially completed and as a general rule in large condominium developments the project will be completed in stages. As a result, individuals may purchase and take possession of a unit when neither the total unit nor the common property of the project is substantially completed. In such a case, the purchaser may be exposed to the liability for builders' liens registered at or after substantial completion of the entire project and after the date that the purchaser's title was registered. This liability is a result of the provisions contained in the Builders' Lien Act[2] which provide for the protection of a contractor or materialman who has provided labour or material to the property.

1. The Builders' Lien Act

The provisions contained in the Builders' Lien Act which are most important in the initial stages of a condominium project are those which require the establishment of a lien fund, define an "improvement", and impose upon the potential lien claimant a specific time limitation in which a builder's lien can be registered.

(a) Lien Fund

A calculation of the lien fund is provided by Section 15(1) of the Builders' Lien Act which defines "the lien fund" as:

> 15(1) In this Section and in Section 18, "the lien fund" means the percentage retained by the owner as required by this Section, plus any amount payable under the contract which has not been paid by the owner under the contract in good faith prior to the registration of a lien, less any amount permitted by Section 16 to be paid.

---

2. R.S.A. 1980, c. B-12.

The percentage to be retained by the owner as referred to in Section 15(1) of the Builders' Lien Act is provided for in Section 15(2) which requires that:

> 15(2) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract an owner liable on a contract under which a lien may arise shall, when making payment under the contract, retain for the time limited by Section 30, an amount equal to 15 percent of the value of the work actually done.

(b) Definition of an "improvement"

The term "improvement" is defined in Section 1(d) of the Builders' Lien Act as being:

> 1(d) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

(c) Computation of the Statutory Time Period

Under the Builders' Lien Act, the time for registration of the lien is provided by Section 30 which states:

> 30(1) A lien in favour of a contractor or a subcontractor in cases not otherwise provided for, may be registered at any time up to the completion or abandonment of the contract or subcontract, as the case may be, and within 35 days after completion or abandonment.
>
> (2) A claim of lien for materials may be registered at any time during the furnishing of the materials and within 35 days after the last of the materials is furnished.
>
> (3) A lien for the performance of services may be registered at any time during the performance of the services and within 35 days after the performance of the services is completed.
>
> (4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed and within 35 days after the completion of the work.

2. Registration of a Builder's Lien After the Date of Conveyance

In terms of liability for builders' liens, a new condominium purchaser will share the same liability as a purchaser of a conventional home. Accordingly, he may be held liable for builders' liens which were registered prior to acquisition and transfer of the title, as a result of labour or materials being provided to the unit property. However, in addition to this liability, a condominium purchaser as a co-owner of the common property and as an owner of a unit which is part and parcel of the entire project, may be held liable for builders' liens which were registered as a result of labour or materials being provided to the common property or another unit in the project, prior to the completion of the entire project.

In most cases, owner developers have retained the statutory holdback; however should an owner developer fail to do so, and cause certain of the units to be sold prior to the completion of the entire project, the validity of builders' liens registered after the date of conveyance and the liability of the purchaser for such liens will depend upon whether the labour or materials were provided to an "improvement" and whether the builder's lien was registered within the statutory time period? With respect to such a determination, is an "improvement" to be considered as meaning each individual unit and that there can be substantial completion of each unit before substantial completion of the entire project? Alternatively, does an "improvement" consist of all the individual units together with their related share of the common property and therefore the term substantial completion is meant in reference to the entire property contained in the condominium project?[3]

---

3. Engineering and Plumbing Supplies (Vancouver) Ltd. v. Total Ad Developments Limited et al, (1975) 59 D.L.R. (3rd) 316 at 318.

In Alberta, a case has yet to arise which will answer these questions. Fortunately, in the recent British Columbia County Court decision of Engineering and Plumbing Supplies (Vancouver) Ltd. v. Total Ad Developments Ltd. et al,[4] the Court provided an answer to these questions by interpreting legislation virtually identical to that in Alberta. The facts of the case were that the defendant, Total Ad, owner of certain property, entered into a contract with the defendant Lauchlan to construct 123 strata-lot apartments. The property and improvements consisted of two buildings containing 66 and 57 lots respectively including recreational facilities. Lauchlan entered into a subcontract for plumbing with the defendant Munroe Plumbing; and Munroe Plumbing entered into a contract with Engineering and Plumbing who, pursuant to this agreement, supplied and delivered certain materials to the property prior to October 23, 1972. Munroe Plumbing also entered into a contract with Universal which supplied and delivered certain materials to the property after October 23, 1972. On October 23, 1972, Total Ad registered a strata plan covering the land and improvements. On February the 9th, 1973 Engineering and Plumbing filed a claim of lien, while the plaintiff, Universal, filed a claim of lien on March 8, 1973. Prior to both filing dates certain of the defendants had purchased various strata lots, and obtained transfer and possession. The building containing 57 strata lots was substantially completed more than 31 days before the date of filing of either claimants' lien; while the other building containing 66 strata lots was not substantially completed more than 31 days before the filing of either lien. Nor had the common property and facilities been substantially completed more than 31 days before the filing of either claimants' lien. The plaintiff materialmen supplied the materials which were included in both buildings and on the common property.[5]

---

4. Supra n. 3.
5. D.J. Pavlich, The Strata Titles Act, supra n. 10 of Chapter One at 48; see also, supra n. 3 at 317.

The issue to be determined by the Court was whether the two plantiff materialmen had filed their claims of lien within the time provided by the Mechanics' Lien Act?[6] In making such a determination, McTaggart, Co. Ct. J., stated that the key element was the meaning of the word "improvement" as that word is defined in Section 23(2) of the Mechanics' Lien Act.[7] In deciding for the plaintiff materialmen, the learned Judge was of the opinion that in the condominium context, the word "improvement" was broad enough to include the entire condominium project and accordingly, a reference to substantial completion must be with reference to the total unit and common property contained in the project.[8] In accordance with this opinion, the individuals who had purchased their units and registered their titles prior to the registration of the plaintiff materialmens' liens which had been registered within the statutory time period were held to take their titles subject to the liens.[9]

3. Alberta's Position

As mentioned previously, a situation analogous to that which presented itself in the Engineering case has not yet arisen in Alberta. It can be stated though that given such a situation, the outcome may be different in light of certain provisions contained in the Alberta Land Titles Act[10] which are not present in the British Columbia Land Titles Act.[11]

(a) Land Titles Act

By virtue of Sections 56 and 64(1)(2) of the Land Titles Act, it can be stated that where a purchaser bona fide purchases property and

---

6. R.S.B.C. 1960, c. 238.
7. Supra n. 3 at 317.
8. Supra n. 3 at 320.
9. Supra n. 3 at 320.
10. Supra n. 13 of Chapter Four.
11. S.B.C. 1978, c. 25.

title passes to the purchaser, that purchaser will take title subject only to such encumbrances which are contained on the title at the date of conveyance.

These Sections read as follows:

56 After a certificate of title has been granted for any land, no instrument is effectual to pass any estate or interest in that land (except a leasehold interest for three years or for a less period) or to render that land liable as security for the payment of money unless the instrument is executed in accordance with this Act and is registered hereunder, but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein passes or, as the case may be, the land becomes liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature.

64(1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud wherein he has participated or colluded, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates and interests that are notified on the folio of the register that constitutes the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofor in force and relating to title to real property.

(2) Such property shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held possession.

The combined effect of these Sections is to bar a potential lien claimant from registering a builder's lien after the date of conveyance. Accordingly, it is of no consequence that the lien claimant was within the statutory time period for the registration of a lien, as the transferring of the title in the absence of the registration of a lien nullifies the possibility of a lien being registered after the date of conveyance.

(b) Hager Case

The primary judicial authority which supports the above mentioned proposition was rendered by the Supreme Court of Canada in the case of Hager v. United Sheet Metal.[12] The facts of the case were that labour and materials were provided by the respondent at the request of and for the benefit of one Carter and were utilized in the improvement of a building on land which was owned by Carter. The labour and materials had been provided prior to June 13, 1951, on which date Carter had sold the premises to the appellants, who became bona fide purchasers for valuable consideration and to whom on that date, was issued a certificate of title to the land. On the following day, June 14, 1951, the respondent, United, registered a machanic's lien and subsequently, the other respondents registered liens, all of which were registered within the time period permitted for registration by the statute.

The primary issue to be resolved was stated by the Court as being:

> "Do the appellants, who bona fide purchased the land here in question and became registered owners thereof after the respondents had provided labour and materials utilized in the construction of a building thereon but before they had registered mechanics' liens (though registration thereof was within the time permitted by The Mechanics' Lien Act, R.S.A. 1942, C. 236) hold the land subject to or free from mechanics' liens?"[13]

In resolving this issue it was necessary for the Court to make a determination as to whether or not the provisions contained in The Mechanics' Lien Act, which favoured the respondent's position overroad the protection granted to the appellants under Sections 56 and 63 (now Section 64) of The Land Titles Act? After reviewing both pieces of legislation, Estey J. held:

---

12. (1954) 3 D.L.R. 145.
13. Supra n. 12 at 146.

> "The Land Titles Act of Alberta (R.S.A. 1942 c. 205) is a statute of general application to all the lands throughout the Province. The Mechanics' Lien Act creates a lien in favour of those who provide labour and materials utilized in the construction, alteration or repair of buildings. It is, therefore, legislation in favour of specified parties who, as a result thereof, may register an encumbrance against the land in the appropriate Land Titles Office. It follows that the effect of registration of a mechanic's lien in the Land Titles Office must be determined under the provisions of The Land Titles Act, except as these may be repealed, altered or modified by the provisions of The Mechanics' Lien Act. This conclusion, apart from the general principles of construction, is supported by the provisions of The Mechanics' Lien Act. ...The Mechanics' Lien Act, therefore, does not alter or modify the provisions of The Land Titles Act in respect to an owner in the position of the appellants who, under Section 60(1) of The Land Titles Act, hold their certificate of title "subject...to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens..." All of the liens here in question were not "notified on the folio" when the certificate of title was issued to the appellants. It must follow that they hold the land free and clear thereof."[14]

Recently, the applicability of the Hager decision to the law of Alberta has been questioned by certain members of the Alberta Bar.[15] Such questioning is a direct result of the fact that since Hager was decided, certain amendments have been made to the Builders' Lien Act which if present at the time Hager was decided may have caused the Court to decide otherwise. In this respect, the views of one practitioner are as follows:

> "The suggestion has been made that the Hager v. United Sheet Metal case is no longer applicable to the Province of Alberta. In the Hager case Mr. Justice Estey stated that the rights conferred by The Mechanics' Lien Act were repugnant to the old Section 61 of The Land Titles Act. Mr. Justice Estey held that it was an important consideration in resolving the two Acts that Section 2(g) of The Mechanics' Lien Act which defined "owner" stated "that unless the context otherwise requires" meant that The Land Titles Act overrode

---

14. Supra n. 12 at 147.
15. W.D. Goodfellow, The Builders' Lien Act - Practice and Procedure, Selected Papers Presented at the Mid-Winter Meeting of the Alberta Branch Canadian Bar Association, (1978), 59.

> the specific provisions of The Mechanics' Lien Act. The definition of "owner" in The Builders' Lien Act has no such qualification and as the specific overrides the general, the definition of "owner" under The Builders' Lien Act may override the privileges given to a purchaser under Section 56 of The Land Titles Act."[16]

In support of the above mentioned view it can be noted that in the Engineering case, the Court relied on the doctrine that where two pieces of legislation are in conflict with respect to the same subject matter, the specific legislation will override that of the general. In this respect, McTaggart, Co. Ct. J., stated:

> "It is clear that were it not for the passing of The Strata Titles Act the problem herein would not have arisen. What is the effect of that Act in respect of The Mechanics' Lien Act? If The Mechanics' Lien Act is considered as dealing with a special subject, i.e. liens, and The Strata Titles Act is considered as dealing with a general subject, i.e. subdivision of land in strata and the disposition of title thereto, then it cannot be presumed that the general Act intended to interfere with the special provisions in The Mechanics' Lien Act unless that intention is very clearly manifested: see Maxwell on Interpretation of Statutes, 12th Edition (1969), p. 196. In the absence of clear language I doubt that the legislature intended on passing The Strata Titles Act to permit one party, in this case the owner, to deal with its property in such a way as to prejudice other parties who are entitled to rights under The Mechanics' Lien Act."[17]

It is suggested that in light of the present statutory and judicial uncertanty with respect to the position of a purchaser who purchases a new unit and registers his title prior to the registration of a builder's lien, the Alberta legislature should amend the Condominium Property Act vis a vis the application of the Builders' Lien Act and the Land Titles Act to such a situation.

B. Ineffectiveness of the Provisions Contained in the Condominium Property Act

The present conflict which exists between the provisions contained in the Builders' Lien Act and in the Land Titles Act have the effect of

---

16. Supra n. 15 at 62.
17. Supra n. 3 at 320.

placing a purchaser of a new unit in an uncertain position with respect to the liability for builders' liens which are registered after the date of conveyance.

1. Section 11

In order to reduce the harmful effects which accompany such uncertainty, the legislature has provided in the Condominium Property Act a form of assurance to a purchaser of a new unit that the owner developer will have sufficient funds available to provide clear title to a purchaser upon completion of the entire project. This provision is contained in Section 11 of the Act which reads as follows:

> 11(1) A developer or a person acting on his behalf shall hold in trust all the money paid by the purchaser under a purchase agreement, other than rents, security deposits or mortgage advances, and
>
> (a) if the improvements to the residential unit and the common property are substantially completed, that money may be paid to the developer on delivery of the title document to the purchaser, or
>
> (b) if the improvements to the residential unit are substantially completed but the improvements to the common property are not substantially completed,
>
> (i) not more than 50% of that money less the interest earned on it may be paid to the developer on delivery of the title document to the purchaser, and
>
> (ii) upon the improvements to the common property being substantially completed, the balance of that money and all the interest earned on the total amount held in trust in respect of that purchase agreement may be paid to the developer.
>
> (2) The developer or a person acting on his behalf who receives money that is to be held in trust under subsection (1) shall forthwith deposit the money into an interest bearing trust account maintained in a bank, treasury branch, trust company or credit union in Alberta.

(3) Money deposited under subsection (2) shall be kept on deposit in Alberta.

(4) If money is being held in trust under subsection (1) and the purchaser of the residential unit takes possession of or occupies the unit prior to receiving the title document, the interest earned on that money from the day the purchaser takes possession or occupies the unit to the day he receives the title document shall be applied against the purchase price of the unit.

(5) Subject to subsection (4), the developer is entitled to the interest earned on money held in trust under this Section.

(6) For the purpose of this Section, improvements to the residential unit or the common property, as the case may be, are deemed to be substantially completed when the improvements are ready for use or are being used for the purpose intended.

(7) This Section does not apply in respect of money paid to a developer, or to a person acting on behalf of a developer, under a purchase agreement if that money is held under the provisions of a plan, agreement, scheme or arrangement approved by the Minister that provides for the receipt, handling and disbursing of all or a portion of that money or indemnifies against loss of all or a portion of that money or both.

Basically Section 11 is an attempt by the legislature to provide a purchaser with security of title from the attachment of a builder's lien. However, as the balance paid under Section 11 is due at the time the improvements are substantially completed, it is still possible that a builder's lien could be filed against the purchased property after this date, provided the lien was within the statutory time period.

A further weakness of Section 11 is that although it sets out the procedure for the entrusting of money to the owner developer, there is an omission in that there is no provision which will ensure that these provisions of trust are to be carried out. Presumably, an owner developer could use for his own benefit the money so entrusted. In such a case, aside from the enforcement provision contained in Section 71(2), the purchaser in addition, to paying the other half of the purchase price may still be faced with the problem of a builder's lien having

been registered against his title. Section 11 therefore still leaves a purchaser vulnerable to the registration of a builder's lien after the date of conveyance.

2. British Columbia Act

Although Section 11 of the Alberta condominium Act does not provide the desired security of title to a purchaser of a new unit against builders' liens, the British Columbia legislature has provided such security in its condominium legislation. The British Columbia provision is contained in Sections 75 and 76 which read as follows:

> 75(1) Notwithstanding any other Act, where an owner developer conveys a strata lot to a purchaser, no builder's lien shall be filed against the strata lot, or against the purchaser's share in the common property, later than 31 days after the date the strata lot is conveyed to the purchaser.
>
> (2) Notwithstanding any other Act, or any agreement to the contrary, a purchaser of a strata lot from an owner developer shall retain a holdback in the amount of 15% of the gross purchase price of the strata lot, or any smaller amount fixed by regulation, for a period of 40 days after the date the strata lot is conveyed to the purchaser.
>
> (3) The holdback is subject to a lien under the Builders' Lien Act, and the holdback is charged with the payment of those persons employed under the person from whom the holdback is retained.
>
> (4) Payment of a holdback required to be retained under subsection (2) shall be made after 40 days expire unless in the meantime a claim of lien has been filed, or proceedings have been commenced to enforce a claim of lien against the holdback.
>
> (5) On payment of the holdback amount, all liens of the person to whom the holdback is paid, and of any person employed under him for the strata lot are discharged.
>
> 76(1) Where one or more liens have been filed against a strata lot purchased from an owner developer, the purchaser may, by interlocutory application in proceedings that have been commenced to enforce the lien, or on originating application, pay into the court having jurisdiction the smaller of the

(a) total amount of the claims filed; or

(b) full amount of the holdback under section 75(2).

(2) Payment into court under subsection (1) discharges the purchaser from liability to the vendor or the lienholder for the claims of lien filed. The money paid into court stands in the place of the strata lot and the order shall provide that the liens be removed from the title to the strata lot.

(3) Except as provided in this Act, the Builders' Lien Act applies.

From the stand point of the purchaser, Sections 75 and 76 have all but resolved the problems associated with builders' liens where an individual purchases a unit in a project when the total project has not been substantially completed. Such resolution is a result of the fact that Section 75 limits the time in which a builder's lien can be registered after the date of conveyance. In the event that a builder's lien were registered within this time period, the imposition under Section 75 of a statutory holdback for a period in excess of the statutory time period has the effect of ensuring that a lien claimant will be paid.

Although Sections 75 and 76 do provide a purchaser with security of title from the registration of builders' liens, such security may be at the expense of the lien claimant. As the two statutory time periods begin to run from the date of conveyance, a problem is created in that a lien claimant may not always be aware that a conveyance of the property has taken place. Accordingly, the lien claimant may be barred from registering his builder's lien due to the expiration of the statutory time period. Due to this factor, Sections 75 and 76 cannot be considered as the total answer to the problems associated with builders' liens and the purchasing of a new unit.

In light of the inadequacies of the present Alberta legislation, it is suggested that the Alberta legislature amend the existing condominium legislation and accordingly, provide for security of title to purchasers

of new condominiums from the ramifications which can arise if a builder's lien is registered subsequent to the date of conveyance. In this respect, Sections 75 and 76 of the British Columbia legislation may very well provide a starting point for such amendment.

III PURCHASING AN EXISTING UNIT

As the previous discussion illustrates, a puchaser of a new condominium unit may be held liable for builders' liens which are registered as a result of labour or materials being provided to a unit or the common property of the project. In this respect, such liability will be equally applicable to a purchaser of an existing condominium unit and accordingly, such a purchaser should be aware of the following problems:

1. The liablity of a purchaser of an existing unit for builers' liens associated with a unit or the common property of a project.

2. The provisions contained in the Condominium Property Act are insufficient in providing the corporation with the means of raising the funds necessary to discharge builders' liens.

3. Neither the Condominium Property Act or the Builders' Lien Act allows a unit owner who wishes to clear his title from an encumbering builder's lien, the right to obtaining a partial discharge of such a lien.

A. Maintaining the Project

As mentioned previously in this Thesis,[18] the statutory duties of the corporation include the maintaining of the common property and the complying with notices or orders by a local or public authority

---

18. Supra n. 5 of Chapter Two.

requiring repairs to be done in respect of any property contained in the project both unit or common.[19] In order for the corporation to carry out such maintenance and repairs, contracts will have to be made with third parties for the acquiring of the necessary labour and material.

In recognition of the fact that such contracts will be concluded by the corporation in the performance of its statutory duties, the legislature has modified the relevant provisions of the Builders' Lien Act. This statutory modification is contained in Section 70(b)(c) of the Condominium Property Act which reads as follows:

> 70(b) For the purpose of the Builders' Lien Act, if on the request of a corporation
>
> (i) work is done on or in respect of the common property or a unit or both, or
>
> (ii) material is furnished to be used in the common property or a unit or both
>
> intended for the benefit of the common property generally, any lien that arises under that Act in consequence of it is on the estates of all the owners in all the units and the common property.
>
> (c) if on the request of a corporation
>
> (i) work is done on or in respect of any unit, or
>
> (ii) material is furnished to be used in any unit.
>
> intended for the benefit of that unit, any lien that arises under that Act in consequence of it is on the estate of the owner in that unit and his share in the common property.

---

19. The corporation's duty to comply with notices or orders of a local or public authority is contained in Section 30(2)(b) of the Condominium Property Act and this duty relates to the parcel. By virtue of Section 1(1)(o) of the Condominium Property Act the term "parcel" is defined as, "the land comprised in a condominium plan". Accordingly, as the land comprised in a condominium plan is the total unit and common property of a project, the duty contained in Section 30(2)(b) is in reference to this total property.

In a situation where a unit falls into disrepair and such a state breaches a municipal or provincial law, the corporation by virtue of Sections 31(1)(b) and 70(c) of the Condominium Property Act has the requisite authority to carry out the required repairs should the unit owner fail to do so. Any liability for builders' liens which are registered as a result of such repairs, will only attach to the delinquent unit owners interest in the project. However, where at the request of the corporation labour or materials are provided to a unit or the common property, for the benefit of the common property, problems are encountered.

As the corporation's statutory authority is limited to the control, management and administration of the common property, any works performed to a unit at the request of the corporation for the supposed benefit of the common property, would in effect constitute an excess of jurisdiction. As the initial authority is absent, it is irrelevant that such works benefited the common property. Should builders' liens be registered in consequence of such works, such liens by virtue of Section 70(b) will attach to the estates of all the unit owners in the project. Although an aggrieved unit owner may have the right to bring an action against the corporation for compensation, the fact remains that as the legislature in enacting Section 70(b) has provided the manner in which a lien claimant is to register his lien, such a lien would constitute a valid charge against the estates of all the unit owners in the project. It is suggested that in light of this legislative oversight, the legislature should confine Section 70(b) so that reference is only made to the common property.

Although the terminology employed in Section 70(b) may create problems for the unit owners, additional problems are created where the corporation requests labour or materials for the maintenance of the common property. In this respect, there is a fine line between what is to be considered as constituting an improvement or betterment of the common property. As discussed in Chapter Three a unit owner who is in

the minority and who is opposed to such works may be forced by the majority into requesting labour or materials for unnecessary works. In such a situation, the unit owner who was opposed to such a request may by virtue of Section 70(b) find himself liable for the payment of builders' liens that have been registered against his interest in the project.

B. Payment of the Lien

In the ordinary course of events, the possibility of a contractor or materialman invoking the lien provision contained in Section 70(b) is remote as there are usually ample funds available to the corporation for the payment of such debts. In this respect there are three methods by which such funds can be made available to the corporation: by the capital replacement reserve fund, by means of borrowing or by way of levying a contribution.

1. Capital Replacement Reserve Fund

In an average situation, the corporation could realize the necessary funds by drawing from the fund established pursuant to Section 33(1) of Appendix I of the Act. This fund, which is termed the "capital replacement reserve fund" is expressly to be used for the repair and the replacement of "...any real and personal property owned by the corporation and the common property, when the repair or replacement does not occur annually."[20] However, such a fund was not designed to provide a sole source of revenue for large expenditures. In the event that the expediture is immoderately high, this fund would likely not contain the necessary monies to meet the expenditure.

---

20. Section 33(1) of Appendix I, supra n. 1 of Chapter One.

2. Borrowing Funds

As a second alternative, the corporation could merely rely on its authority to "borrow money required by it in the performance of its duties or the exercise of its powers."[21] Unfortunately, this method may prove futile as the corporation may not have sufficient assets to serve as collateral for a loan of a large amount. In such a situation, lending institutions may be leery of granting a large loan and the attaining of the loan may only be achieved on the condition that all of the unit owners in the project provide a personal guarantee for the loan. It is unlikely, however, that the corporation would be able to obtain such guarantees.

3. Levying of a Contribution

With respect to cases involving large expenditures the better course of action would be for the corporation to levy a contribution. By virtue of the power provided by Section 31(1)(c), a corporation can levy "...contributions on the owners in proportion to the unit factors for their respective units."[22] In terms of effectiveness, it would appear that this is the better of the three methods as in choosing to levy a contribution, the corporation stands a better chance of raising the necessary funds as it can always pressure a belligerent unit owner into paying the contribution by either suing the defaulting owner in debt[23] or by liening that individual's interest in the project.[24]

---

21. Section 3(b) of Appendix I, supra n. 1 of Chapter One.
22. The amounts raised by levying contributions in accordance with Section 31(1)(c) are deposited in a fund which in accordance with Section 31(1)(a) is to be used by the corporation "... for administrative expenses sufficient in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;".
23. Section 30(2) supra n. 1 of Chapter One.
24. Section 31(4)(5) supra n. 1 of Chapter One.

C. Clearing the Title of a Builder's Lien

In the majority of cases, the corporation will be able to raise the necessary funds by any one of the above means but assuming that the corporation cannot, and a builder's lien is registered against all of the unit and common property in the project, then what is the position of those unit owners who wish to clear their title from the encumbering lien? In such a situation, a unit owner who wishes to clear his title may be forced into paying the entire amount of the lien as a lien claimant under the Builders' Lien Act or the Condominium Property Act does not have to give a partial discharge of the lien.[25]

1. Ontario

Although there is no provision in Alberta which allows for a partial discharge of a lien, the legislatures of Ontario and New York have entrenched such a remedy in their respective condominium legislation.[26] In this respect, the Ontario provision reads as follows:

> (7) No encumbrance is enforceable against the common elements after the declaration and description are registered.
>
> (8) Where, but for subsection 7, an encumbrance would be enforceable against the common elements, the encumbrance is enforceable against all the units and common interests.
>
> (9) Any unit and common interest may be discharged from such an encumbrance by payments to the claimant of a proportion of the sum claimed, determined by the proportions specified in the declaration for sharing the common interests.
>
> (10) Upon payment of a portion of the encumbrance sufficient to discharge a unit and common interest, and upon demand, the claimant shall give to the owner a discharge of that unit and common interest in accordance with the regulations.

---

25. A. Rosenberg, Condominium in Canada, supra n. 6 of Chapter One at 7; see also, Risk, "Condominiums in Canada", supra n. 1 of Chapter Three at 31.
26. Supra n. 18 at Chapter Two.

Unfortunately, a statutory provision which allows for a partial discharge of a builder's lien will not eliminate all sources of problem. In this respect, what is the position of a unit owner, where a contribution has been levied by the corporation and that unit owner has paid the levy yet a builder's lien is still registered against his interest in the project? In such a situation, even if there were a statutory provision in existence which provides for a partial discharge, the lien claimant would be justified in refusing to provide a partial discharge as the payment has been made not to the lien claimant but to the corporation.

2. New York

In New York, that state's legislature has devised a unique scheme whereby, if materials or labour are furnished for the common property, the right to register a builder's lien against all the units in the project has been completely eliminated. To compensate the contractor or materialman, the legislature has replaced the right to register a builder's lien with the right to draw from a trust fund which operates within the perimeters of the condominium scheme. In this respect, the New York provision reads as follows:[27]

> 2. Labour performed on or materials furnished for a unit shall not be the basis for the filing of a lien pursuant to Article 2 of the lien law against the unit of any unit owner not expressly consenting to or requesting the same, except in the case of emergency repairs. No labour performed on or materials furnished to the common elements shall be the basis for a lien thereon, but all common charges received and to be received by the Board of Managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labour or materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers, and the same shall be expended first for such purpose before expending any part of the same for any other purpose.

---

27. Condominium Act, Real Property Law, Consolidated Laws of New York, 1968, 339-d, Article 9-B.

Although the New York provision does provide an unpaid contractor or materialman with security of payment and protects a unit owner from having to pay more than his proportionate share of a levy in order to clear his title, it does have a number of material draw backs. In reference to these draw backs one writer states:

> "This device of transforming a mechanic's lien into a species of personal property is ingenius, especially if it functions without creating new worries for the venture. Its success would depend upon the willingness of prospective contractors to forego their liens in exchange for claims against assets that might be non-existant when the claims mature. That mechanics who find the lien a useful and familiar remedy will readily enter into contracts in which they must rely upon a novel security device is an unproved and doubtful proposition. Their attorneys would undoubtfully warn them of uncertainties regarding the operation of the trust. For example: does the trust start while the job is being performed or when a claim for payment is made? Does the trust corpus consist of all common charges or only those based upon the mechanic's services? How can the mechanic compel payment of charges by delinquent unit owners?"[28]

In spite of these possible disadvantages, the New York provision has an advantage in that it places the burden of collection properly upon the corporation's board of managers.[29] As the corporation has the necessary statutory power to compel a delinquent owner into paying his proportionate share of the levy, the corporation and not the contractor or materialman would be in the better position to ensure that payment is made. However, it would appear that as a whole, the disadvantages of this scheme[30] far out weigh the advantages and in this respect, an implementation in Alberta of such a scheme might create more problems than already exist under the present legislation.

---

28. C. Berger, "Condominium Shelter on a Statutory Foundation", (1963) LXIII Columbia Law Review at 1023.
29. C. Berger, "Condominium Shelter on a Statutory Foundation", supra n. 28 at 1023.
30. R.C.B. Risk, "Condominiums in Canada", supra n. 2 of Chapter Three at 30.

In order to resolve the problems associated with builders' liens and the maintenance of the common property, it is submitted that the Alberta legislature adopt a provision similar to that of Ontario. In addition though, provision should be made that in cases where a contribution has been levied for the purposes of paying a lien claimant and a unit owner has paid his share of the levy, that unit owner should be assured a partial discharge, and should not have to pay again in order to obtain such a discharge. In such a case, to ensure that the unpaid lien claimant is not prejudiced, provision should be made whereby the lien claimant would have the right to proceed against the corporation for the amount which is being relinquished in giving the partial discharge.

IV. CONCLUSION

In conclusion, it can be seen that the area of builders' liens when placed in the context of the condomnium form of housing has caused certain problems. These problems will not be resolved unless the Alberta legislature enacts the necessary remedial legislation. In this respect, it is submitted that in order to provide a unit owner with security of title the Alberta legislature should formally adopt the proposals suggested throughout this Chapter and legislate accordingly.

CHAPTER VI
CONCLUSION

In the Canadian context, the legislatures of Alberta, British Columbia and Ontario are to be credited with the honour of having passed the first condominium legislation.[1] Aside from sharing this distinction, these provinces also share the common distinction of having modeled their condominium legislation after the New South Wales precedent.[2] Although the original New South Wales legislation provided the basic essentials for implementing the statutory condominium, it was soon found to be inadequate, and accordingly it was repealed and replaced. Many of the provisions contained in the new legislation have been adopted by the respective legislatures of British Columbia and Ontario. With respect to Alberta, such adoption has not taken place and as mentioned at the outset of this Thesis,[3] although there have been amendments, the Alberta legislation is in substance the same as that long since discarded in New South Wales.

In Alberta, there have been very few cases concerning condominiums and condominium legislation. This fact might suggest to the uncritical that the legislation is not only well understood but effective. On the other hand, until recently, there have been very few condominiums in Alberta and its legislation has not been subjected to the attack and scrutiny that such legislation has been elsewhere. Elsewhere, the legislation has been drastically changed as its inadequacies have become apparent and it is expected that the Alberta legislation will share the same fate.

---

1. The Alberta and British Columbia statutes came into force on September 1, 1966; and the Ontario statute came into force on September 1, 1967.
2. See generally, A. Rosenberg, Condominium in Canada, supra n. 6 of Chaper One at 1-4.
3. See Chapter One at 3.

In this Thesis, an endeavour has been made to point out certain of the inadequacies inherent in the current legislation which causes such legislation to be completely unacceptible in terms of providing the buying public with an assurance that an individual's interests, both financial and aesthic, in a condominium project will be protected.

In Chapter Two, the rights of the unit owner, where the condominium corporation fails to perform its statutory duties were discussed. From such discussion, it can be seen that in protecting such rights, the remedies contained in the Condominium Property Act are slow, expensive or extreme and accordingly, unacceptable. However, other jurisdictions such as Ontario, British Columbia and New South Wales have provided such protection by implementing within their respective condominum statutes provisions which either allow a unit owner a specific right of action against the condominium corporation or provides the means for resolving a dispute between an aggrieved unit owner and the condominium corporation.

In Chapter Three, the rights of the minority unit owner with respect to the internal government of the condominium project were found to be insecure. In this respect, the Condominium Property Act has provided the majority with powers which can be used against the minority in a dictatorial manner by means of the passage of bylaws which are unreasonable or oppressive to the minority. In other jurisdictions, such as Ontario, British Columbia and New South Wales, their respective legislatures have placed a check on the power of the majority by implementing within their respective condominium statutes either an express provision that a bylaw be reasonable or the statutory means of ensuring that a bylaw in order to be enforceable be reasonable.

In Chapter Four, it was seen that unit owners, as owners in common in the common property, may due to such association, be susceptible to

unlimited tortious liability. In this respect, the Condominium Property Act, fails to provide the unit owners with the necessary protection against such liability. However, in other jurisdictions such as Ontario and New South Wales such liability has been placed on the shoulder's of the condominium corporation rather than on the individual unit owners. Alternatively, other jurisdictions such as Massachusets and New Jersey have not only re-directed such liability to the condominium corporation but have also limited the liability.

In Chapter Five, the unit owner's liability for builders' liens during the initial stages of the condominium project and during the projects entire life were discussed. From such discussion, it is apparent that the Condominium Property Act fails to provide the unit owners with title security from the financial ramifications created by the registration of builders' liens. In other jurisdictions such as Ontario, British Columbia and New York, provision has been made in their respect condominium statutes which provides such security of title.

Today, we have the benefit of an increased volume of case law concerning problems associated with the condominium form of housing. In addition the legislatures in other jurisdictions have formulated note worthy statutory provisions specifically designed to deal with these problems. In England, where condominiums have existed for over 400 years, condominiums are created by contract and are governed by the common law of contract.[4] The English experience is unique not because it operates in the absence of an enabling statute but because it operates successfully. The marked absence of litigation over a period of 400 years concerning condominiums provides proof of such success. This fact has been attributed by one authority to the ability of English

---

4. Vol. I, A. Ferrer and K. Stecher, Law of Condominium, supra n. 8 of Chapter One at 65.

solicitors in devising condominium schemes which satisfy the local demand.[5]

If the English solicitors can create a contractual condominium scheme which satisfies the needs of all parties concerned, why cannot the Alberta legislative draftsmen create an equally successful statutory scheme? We have the benefit of the case law and workable statutory precedents from other jurisdictions which would make the task of devising a functional statutory condominium scheme a simple one. It is expected that if this cannot be achieved by the Alberta legislative draftsmen within the immediate future, the condomium concept will not enjoy the success that it has achieved in other parts of Canada and the world.

In this respect, the recommendation made by Professor D. J. Pavlich to the British Columbia legislature, in reference to the Strata Titles Act[6] is equally applicable to the Alberta legislature. Professor D. J. Pavlich's recommendation is as follows:

> "It is suggested that because of the complexity of the Act and the extent of condominium activity in the Province, the government, as author of a piece of legislation that affects one of the few major investments of most ordinary mortals, has a responsibility to ensure that its creation achieves its noble objectives and does not become a monster and the source of a legal (and social) nightmare for many owners. It is respectfully submitted that our Legislature should set up machinery for the supervision and comprehensive administration of the Act. So far the government's administration covers only the incipient stages of condominium development, thereby affording protection to a few. The real test of condominium viability will depend on its ability to serve efficaciously the needs of the consumer. This requires greater involvement over an extended period of time.[7]

---

5. Vol. I, A. Ferrer and K. Stecher, Law of Condominium, supra n. 4 at 66.
6. S.B.C. 1974, c. 89; this is the old condominium legislation which has since been repealed and replaced by the Condominium Act, R.S.B.C. 1979, c. 61, supra n. 24 of Chapter Two.
7. D.J. Pavlich, The Strata Titles Act, supra n. 10 of Chapter One at 172.

It is hoped that the Alberta legislature will heed this recommendation and enact the necessary remedial provisions. As a possible guide to such enactment, it is suggested that the Alberta legislature review the various proposals suggested throughout this Thesis as a possible means of ensuring the success of the condominium concept in the real estate market of Alberta.

BIBLIOGRAPHY

ALLEN, J.M. "Alabama Apartment Ownership - A Condominium Law Introduction" (1964) 17 Alabama Law Rev. 374.

ASHBY, L.C., and BAILEY, J.H. "Condominiums: Incorporation of the Common Elements - A Proposal" (1969) 23 Vanderbilt Law Rev. 321.

BERGER, C.J. "Condominium: Shelter on a Statutory Foundation" (1963) LXIII Columbia Law Rev. 987.

BROWN, M. "Living in a Condominium: Individual Needs Versus Community Interests" (1977) 46 University of Cincinnatti Law Rev. 523.

BUGDEN, G.F. Strata Title Management Practise in New South Wales (1977)

CASEY, J.L. "Board of Manager's Authority to Borrow Money" (1963) 63 Columbia Law Rev. 1122.

DAVIS, I. "Condominium and the Strata Titles Act" (1966) 9 Canadian Bar Association 469.

DICKSON, W.F. "Freehold Title Flats?" (1954) 28 Law Institute Journal 133.

DICASTRI, V. Thom's Canadian Torrens System (2nd ed. 1962).

VOL. I AND II, FERRER, A., and STECHER, K. Law of Condominium (1967).

GOODFELLOW, W.D. "The Builders' Lien Act - Practise and Procedure" Selected Papers Presented at the Alberta Branch Canadian Bar Association (1978).

HAKALA, T. "Condominium Casualty and Liability Insurance" (1974) 48 St. John's Law Rev. 1119.

HAMILTON, S.W. Condominiums a Decade of Experience in British Columbia (1978).

HELLMORE, B.A. The Law of Real Property in New South Wales (2nd ed. 1966).

HENDERSON, V. "Community Living Condominium Style: Bed of Roses - or Bed of Thorns?" (1979) 6 University of Los Angeles Law Rev. 121.

JACKSON, F., and COLGAN, D. "The Uniform Condominium Act From a Local Government Perspective" (1970) 10 The Urban Lawyer 429.

VOL XIV, KEETON, G.W. and SCHWARTZENBERGER, G. Current Legal Problems (1961).

KEHOE, P.E. Cooperatives and Condominiums (1974).

KENIN, D.S. "Condominiums: a Survey of Legal Problems and Proposed Legislation" (1962) 17 University of Miami Law Rev. 1.

LANGAN, P. Maxwell on the Interpretation of Statutes (12th ed. 1969).

LAWRENCE, Tort Liability of a Condominium Unit Owner" (1974) 2 Real Estate Law Journal 789.

MACKLEM, D., and BRISTOW, D. Mechanics' Liens in Canada (4th ed. 1978).

MARIARTY, M.J. "A Comparison of United States and Foreign Condominiums" (1963) 63 Columbia Law Rev. 1011.

MCLELLAN, B. "Condominium Legislation" (1978) 36 University of Toronto Faculty Law Rev. 44.

MEGARRY, R.E., and WADE, H.W. The Law of Real Property (4th ed. 1975).

MOSES, N.J., and TZANNES, R. Strata Titles (1978).

PAVLICH, D.J. "Recent Changes to Condominium Leglislation in British Columbia" (1978) 3 Canadian Business Law Journal 34.

PAVLICH, D.J. The Strata Titles Act (1978).

VOL. 4B, POWELL, R. Powell on Real Property (1979).

"Recent Cases: Torts - Condominiums - Condominium Unit Owner has Standing to Sue Unincorporated Unit Owner's Association for Injuries Inflicted Because of the Association's Negligence" (1972) 25 Vanderbilt Law Rev. 271.

RISK, R.C.B. "Condominiums in Canada" (1968) 18 U. of T. Law Journal 1.

ROHAN, P.J. "Condominiums and the Consumer: A Checklist for Counselling the Unit Purchaser" (1963) 63 Columbia Law Rev. 1028.

ROHAN, P.J., and RESKIN, R. Condominium Law and Practise (1965).

ROHAN, P.J. "Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability" (1967) 32 Law and Contemporary Problems 308.

ROHAN, P.J. "Condominium Housing: A Purchaser's Perspective" (1965) 17 Stratford Law Rev. 842.

ROSENBERG, A. Condominium in Canada (1972).

ROSENBERG, A., and SHNIER, L.F. et al "Class Actions for Unit Deficiencies in a Condominium" (1977) 1 The Advocates Quarterly 163.

ROTHENBERG, H.H. What You Should Know About Condominium (1974).

SCHWARTZ, W. "Condomininum: A Hybrid Castle in the Sky" (1969) 44 Boston University Law Rev. 137.

SLUTSKY, B. "Common Law - Minority Rights - Oppression Remedy - Diligenti v. R.W.M.D. Operations Kelowna, et al (1977) 11 U.B.C. Law Rev. 326.

"Symposium on Condominiums" (1974) 48 St. John's Law Rev. 1.

TAYLOR, F.R. Leading Court Decisions in Canadian Real Estate (1978).

TEBBUTT, H.W. "The Conveyancer" (1976) 50 The Australian Law Journal 39.

WEISMAN, J. The Condominium Law: A Study of its Operation (1970).

WEISMAN, J. "The Land Law, 1969: A Critical Analysis" (1970) 5 Israel Law Rev. 379.

APPENDIX I

TABLE OF CASES

Adrian Blunt and Strata Corporation VR 45 (1977) 1 B.C.L.R. 36, Re.

Andrews v. Grand and Toy Alberta Ltd. (1978) 83 D.L.R. (3rd) 852.

Arnold v. Teno (1978) 83 D.L.R. (3rd) 852.

Canadian Pacific Railway Co. v. Canadian Northern Railway Co. (1912) 3 W.W.R. 4.

Diligenti v. R.W.M.D. Operations Kelowna Ltd. (1976) 1 B.C.L.R. 36.

Engineering and Plumbing Supplies (Vancouver) Ltd. v. Total Ad Developments et. al. (1975) 59 D.L.R. (3rd) 318.

Finlay (1977) 7 A.R. 26, Re.

Grimes v. Moreland (1974) N.E. (2d) 699.

Hager v. United Sheet Metal (1954) 3 D.L.R. 145.

Hidden Harbour Estates Inc. v. Norman (1975) 309 So. (28) 180.

Jacklin v. Strata Plan No. 2795 (1975) 1 N.S.W.L.R. 15.

Key et. al. and St. George Holdings Co. Ltd. et. al. (1972) 28 D.L.R. (3d) 168.

Nova Holdings Ltd. v. Western Factors Ltd. and Bird Construction Ltd. (1965) 51 W.W.R. 385.

The Owners' Strata Plan BR162 v. Zapantis Unreported, June 1, 1977, Vancouver Registry, 837-77, (B.C. Provincial Court).

Scottish Cooperative Wholesales Society v. Meyer (1958) 3 All E.R. 66.

Steel and The Conveyancing (Strata Titles) Act 1961 (1968) 2 N.S.W.R. 796.

Thornton, Tanner v. School District No. 57 (1978) 83 D.L.R. (3d) 480.

Winter v. Playa Del Sol Inc. (1977) 353 So. (2d) 598.

York Condominium Corp. No. 42 v. Melanson (1976) 9 O.R. (2d) 118.

APPENDIX II

TABLE OF STATUTES

Arbitration Act, R.S.B.C. 1979, c. 18.

Builders' Lien Act, R.S.A. 1980, c. B-12.

Business Corporations Act, R.S.A. 1980, c. B-15.

Companies Act, R.S.A. 1970, c. 60.

Companies Act, S.B.C. 1973, c. 18.

Condominium Act, R.S.B.C. 1979, c. 61.

Condominium Act, S.O. 1978, c. 84.

Condominium Act, Real Property Law Consolidated Laws of New York 1968, 339-d, Article 9-B.

Condominium Property Act, S.A. 1960, c. 60.

Condominium Property Act, R.S.A. 1980, c. C-22.

Condominiums, Annotated Laws of Massachussets 1977, c. 183A.

Conveyancing (Strata Titles) Act, (N.S.W. - Aus.), 1961, c. 17.

Execution Creditors Act, R.S.A. 1980, c. E-14.

Interpretation Act, R.S.A. 1980, c. I-7.

Land Titles Act, R.S.A. 1980, c. L-15.

Land Titles Act, S.B.C. 1978, c. 25.

Mechanics' Lien Act, R.S.B.C. 1960, c. 238.

Occupiers' Liability Act, R.S.A. 1980, c. O-3.

Property, Alaska Statutes 1975, 34.07.

Property, New Jersey Statutes 1979, 46:8B.

Strata Titles Act, (N.S.W. - Aus.), 1973, c. 68.

Strata Titles Act, S.B.C. 1974, c. 89.

APPENDIX III

CONDOMINIUM PROPERTY ACT

CHAPTER C-22

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1(1) In this Act,

(a) "board" means the board of a corporation as provided for in section 23;

(b) "building" means one or more buildings on the same parcel;

(c) "by-laws" means the by-laws of a corporation as amended from time to time and includes any by-laws passed in substitution for them;

(d) "common property" means so much of the parcel as is not comprised in a unit shown in a condominium plan;

(e) "condominium plan" means a plan registered in a land titles office that complies with section 6 and includes a plan of redivision registered under section 15;

(f) "corporation" means a body incorporated by section 20;

(g) "Court" means the Court of Queen's Bench;

(h) "developer" means a person who, alone or in conjunction with other persons, sells or offers for sale to the public

(i) residential units, or

(ii) proposed residential units,

that have not previously been sold to the public;

(i) "landlord" means an owner of a residential unit that is being rented and includes a person acting on behalf of the owner;

(j) "local authority" means

(i) a city, town, village, municipal district or county,

(ii) the Minister of Municipal Affairs, in the case of an improvement district or a special area, or

(iii) the Minister of the Crown in right of Canada charged with the administration of the *National Parks Act* (Canada), in the case of a National Park;

(k) "management agreement" means an agreement entered into by a corporation governing the general control, management and administration of

(i) the real and personal property of the corporation associated with the residential units, and

(ii) the common property associated with the residential units;

(l) "Minister" means the Minister of Consumer and Corporate Affairs;

(m) "municipality" means the area of a city, town, village, municipal district, county, improvement district, special area or National Park;

(n) "owner" means a person who is registered as the owner of

(i) the fee simple estate in a unit, or

(ii) the leasehold estate in a unit when the parcel on which the unit is located is held under a lease and a certificate of title has been issued under section 3(1)(b) in respect of that lease;

(o) "parcel" means the land comprised in a condominium plan;

(p) "purchase agreement" means an agreement with a developer whereby a person purchases a residential unit or proposed residential unit or acquires a right to purchase a residential unit or proposed residential unit;

(q) "recreational agreement" means an agreement entered into by a corporation that allows

(i) persons, other than the owners, to use recreational facilities located on the common property, or

(ii) the owners to use recreational facilities not located on the common property;

(r) "residential unit" means a unit used or intended to be used for residential purposes;

(s) "special resolution" means a resolution

(i) passed at a properly convened meeting of a corporation by a majority of not less than 75% of all the persons entitled to exercise the powers of voting conferred by this Act or the by-laws and representing not less than 75% of the total unit factors for all the units, or

(ii) signed by not less than 75% of all the persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by this Act or the by-laws and representing not less than 75% of the total unit factors for all the units;

(t) "title document" means, in respect of a residential unit, a transfer of the unit that is registrable under the *Land Titles Act;*

(u) "unanimous resolution" means a resolution

(i) passed unanimously at a properly convened meeting of the corporation by all the persons entitled to exercise the powers of voting conferred by this Act or the by-laws and representing the total unit factors for all the units, or

(ii) signed by all persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by this Act or the by-laws;

(v) "unit" means a space that is situated within a building and described in a condominium plan by reference to floors, walls and ceilings within the building;

(w) "unit factor" means the unit factor for a unit as specified or apportioned in accordance with section 6(g) or 15(5), as the case may be.

(2) Other expressions used in this Act and not defined in subsection (1) have the same meanings as may be assigned to them in the *Land Titles Act*.

RSA 1970 c62 s2;1972 c22 s2;1978 c9 s2;1978 c51 s29

Subdivision of buildings into units

2(1) A building may be designated as a unit or part of a unit or divided into 2 or more units by the registration of a condominium plan under this Act.

(2) The Registrar shall not register a condominium plan unless that condominium plan describes 2 or more units in it.

(3) For the purposes of the *Land Titles Act*, a condominium plan shall be deemed on registration to be embodied in the register.

(4) This Act applies only with respect to land held in fee simple, excepting thereout all mines and minerals.

(5) Notwithstanding subsection (4), if land is held under lease and

a certificate of title has been issued under the *Land Titles Act* in respect of the lease, this Act applies to the land described in the certificate of title, excepting thereout all mines and minerals.

RSA 1970 c62 s3;1972 c22 s3;1978 c9 s3

Certificate of title for unit

3(1) On registering a condominium plan the Registrar

(a) shall cancel the certificate of title to the parcel described in the plan, except as to any mines and minerals comprised in it, and

(b) shall issue a separate certificate of title for each unit described in the plan,

and any interests affecting the parcel that are noted on the certificate of title cancelled under clause (a) shall be endorsed on the certificates of title issued under clause (b).

(2) No more than one unit may be included in one certificate of title and no other land, except the owner's share in the common property, may be included in the same certificate of title with a unit.

(3) After a certificate of title to a unit is issued pursuant to subsection (1), the unit comprised in it may devolve or be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as land held under the *Land Titles Act* and the provisions of that Act apply to those dealings in so far as they do not conflict with this Act or the regulations.

RSA 1970 c62 s4;1972 c22 s4

Certificate to show share in common property

4(1) The Registrar, in issuing a certificate of title for a unit, shall certify on it the owner's share in the common property.

(2) The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.

(3) Except as provided in this Act, a share in the common property shall not be disposed of or become subject to a charge except as appurtenant to the unit of an owner and a disposition of or charge on a unit operates to dispose of or charge that share in the common property without express reference to it.

RSA 1970 c62 s5

Liability of owner

5 Except to the extent that an interest endorsed on a certificate of title relates to that particular unit, the owner of the unit is only liable in respect of that interest in proportion to the unit factor for his unit.

RSA 1970 c62 s6

Condominium Plans

Requirements of condominium plan

6(1) Every plan presented for registration as a condominium plan shall

(a) be described in the heading of the plan as a condominium plan,

(b) delineate the external surface boundaries of the parcel and the location of the building in relation to them,

(c) bear a statement containing those particulars as may be necessary to identify the title to the parcel,

(d) include a drawing illustrating the units and distinguishing the units by numbers or other symbols,

(e) define the boundaries of each unit,

(f) show the approximate floor area of each unit,

(g) have endorsed on it a schedule specifying in whole numbers the unit factor for each unit in the parcel,

(h) be signed by the owner of the property,

(i) have endorsed on it the address at which documents may be served on the corporation concerned in accordance with section 63, and

(j) contain any other features prescribed by the regulations.

(2) If a plan presented for registration as a condominium plan includes residential units, that plan shall, in addition to meeting the requirements of subsection (1), delineate to the satisfaction of the Registrar the boundaries of the areas that are or may be leased under section 41 to an owner of a residential unit.

(3) The Registrar shall, within 28 days from the day a condominium plan is registered, mail to the local authority of the municipality in which the parcel is located, a copy of the registered condominium plan.

RSA 1970 c62 s7;1978 c9 s4

Boundaries of condominium units

7(1) Unless otherwise stipulated in the condominium plan, if

(a) a boundary of a unit is described by reference to a floor, wall or ceiling, or

(b) a wall located within a unit is a load bearing wall,

the only portion of that floor, wall or ceiling, as the case may be, that forms part of the unit is the finishing material that is in the interior of that unit, including any lath and plaster, panelling, gypsum

board, panels, flooring material or coverings or any other material that is attached, laid, glued or applied to the floor, wall or ceiling, as the case may be.

(2) Notwithstanding subsection (1), all doors and windows of a unit are part of the unit unless otherwise stipulated in the condominium plan.

(3) Notwithstanding subsections (1) and (2), if a condominium plan was registered prior to January 1, 1979, the common boundary of any unit described in the condominium plan with another unit or with common property is, unless otherwise stipulated in the condominium plan, the centre of the floor, wall or ceiling, as the case may be.

1978 c9 s5

Certificates to accompany condominium plan

8(1) Every plan presented for registration as a condominium plan shall be endorsed with or accompanied by

(a) a certificate of a land surveyor registered under the *Land Surveyors Act* stating that the building shown on the plan is within the external surface boundaries of the parcel that is the subject of the plan and, if eaves or guttering project beyond those external boundaries, that an appropriate easement has been granted as an appurtenance of the parcel,

(b) a certificate of

(i) an architect registered or licensed under the *Architects Act*,

(ii) a land surveyor registered under the *Land Surveyors Act*,

(iii) a professional engineer registered or licensed under the *Engineering and Related Professions Act*, or

(iv) a holder of a permit issued under the *Engineering and Related Professions Act*, if that holder is authorized to engage in professional engineering,

stating that the units shown in the plan are the same as those existing, and

(c) a certificate of the local authority or of a person the local authority designates stating that the proposed division of the building, as illustrated in the plan, has been approved by the local authority.

(2) If an application is made for a certificate under subsection (1)(c), the local authority

(a) may, with respect to a building that was constructed prior to August 1, 1966 or for which the building permit was issued

prior to August 1, 1966, prohibit the issue of the certificate if it considers it proper to do so, and

(b) shall, with respect to a building for which a building permit was issued on or after August 1, 1966, direct the issue of the certificate if it is satisfied that the building conformed to

(i) the development scheme, development control by-law, zoning by-law or land use by-law, as the case may be, and

(ii) any permit issued under that scheme or by-law,

that existed at the time the building permit was issued.

(3) The provisions of the *Planning Act* relating to the subdivision of land do not apply to the division of a building under a condominium plan if

(a) the surface boundaries of the parcel as defined in this Act on which that building is located correspond to the boundaries of a parcel as defined in the *Planning Act*, and

(b) any building located on the parcel that contains a unit, contains 2 or more units.

RSA 1970 c62 s8;1977 c89 s165;1978 c9 s6

Sale of Residential Units by Developers

Sale of residential units by developers

9(1) A developer shall not sell or agree to sell a residential unit or a proposed residential unit unless he has delivered to the purchaser a copy of

(a) the purchase agreement,

(b) the by-laws or proposed by-laws,

(c) any management agreement or proposed management agreement,

(d) any recreational agreement or proposed recreational agreement,

(e) the lease of the parcel, if the parcel on which the unit is located is held under a lease and the certificate of title to the unit or proposed unit has been or will be issued under section 3(1)(b),

(f) any mortgage that affects or proposed mortgage that will affect the title to the residential unit or proposed residential unit or, in respect of that mortgage or proposed mortgage, a notice prescribed under subsection (2), and

(g) the condominium plan or proposed condominium plan.

(2) A developer may deliver to the purchaser in respect of a mortgage or proposed mortgage a written notice stating

(a) the maximum principal amount available under the mortgage,

(b) the maximum monthly payment that may be paid under the mortgage,

(c) the amortization period,

(d) the term,

(e) the interest rate or the formula, if any, for determining the interest rate, and

(f) the prepayment privileges, if any.

(3) Subject to subsection (4), a purchaser of a residential unit under this section may, without incurring any liability for doing so, rescind the purchase agreement within 10 days from the date the purchase agreement was executed by the parties to it.

(4) A purchaser may not rescind the purchase agreement under subsection (3) if all the documents required to be delivered to the purchaser under subsection (1) have been delivered to the purchaser not less than 10 days prior to the execution of the purchase agreement by the parties to it.

(5) If a purchase agreement is rescinded under subsection (3), the developer shall, within 10 days from his receipt of a written notice by the purchaser of the rescission, return to the purchaser all of the money paid in respect of the purchase of the residential unit.

1978 c9 s7

Rescission of purchase agreement

10 Every developer who enters into a purchase agreement shall include in the purchase agreement the following:

(a) a notification that is at least as prominent as the rest of the contents of the purchase agreement and that is printed in red ink on the outside front cover or on the first page of the purchase agreement stating as follows:

"The purchaser may, without incurring any liability for doing so, rescind this agreement within 10 days of its execution by the parties to it unless all of the documents required to be delivered to the purchaser under section 9 of the *Condominium Property Act* have been delivered to the purchaser not less than 10 days prior to the execution of this agreement by the parties to it.";

(b) a description, drawing or photograph showing

(i) the interior finishing of and all major improvements to the common property located within a building,

(ii) the recreational facilities, equipment and other amenities to be used by the persons residing in the residential units,

(iii) the equipment to be used for the maintenance of the common property,

(iv) the location of roadways, walkways, fences, parking areas and recreational facilities,

(v) the landscaping, and

(vi) the exterior finishing of the building,

as they will exist when the developer has fulfilled his obligations under the purchase agreement;

(c) the amount or estimated amount of the monthly unit contributions in respect of the residential unit;

(d) the unit factor of the unit and the basis of unit factor apportionment for all units comprised in the condominium plan.

1978 c9 s7

Payments held in trust

11(1) A developer or a person acting on his behalf shall hold in trust all the money paid by a purchaser under a purchase agreement, other than rents, security deposits or mortgage advances, and

(a) if the improvements to the residential unit and the common property are substantially completed, that money may be paid to the developer on delivery of the title document to the purchaser, or

(b) if the improvements to the residential unit are substantially completed but the improvements to the common property are not substantially completed,

(i) not more than 50% of that money less the interest earned on it may be paid to the developer on delivery of the title document to the purchaser, and

(ii) on the improvements to the common property being substantially completed, the balance of that money and all the interest earned on the total amount held in trust in respect of that purchase agreement may be paid to the developer.

(2) The developer or a person acting on his behalf who receives money that is to be held in trust under subsection (1) shall forthwith deposit the money into an interest bearing trust account maintained in a bank, treasury branch, trust company or credit union in Alberta.

(3) Money deposited under subsection (2) shall be kept on deposit in Alberta.

(4) If money is being held in trust under subsection (1) and the

purchaser of the residential unit takes possession of or occupies the unit prior to receiving the title document, the interest earned on that money from the day the purchaser takes possession or occupies the unit to the day he receives the title document shall be applied against the purchase price of the unit.

(5) Subject to subsection (4), the developer is entitled to the interest earned on money held in trust under this section.

(6) For the purpose of this section, improvements to the residential unit or the common property, as the case may be, are deemed to be substantially completed when the improvements are ready for use or are being used for the purpose intended.

(7) This section does not apply in respect of money paid to a developer, or to a person acting on behalf of a developer, under a purchase agreement if that money is held under the provisions of a plan, agreement, scheme or arrangement approved by the Minister that provides for the receipt, handling and disbursing of all or a portion of that money or indemnifies against loss of all or a portion of that money or both.

1978 c9 s7

Exemption

12 Section 11 does not apply if the purchaser does not perform his obligations under the purchase agreement.

1978 c9 s7

Limit on security deposit

13 If a purchaser of a residential unit, prior to receiving title to the unit, rents that unit from the developer, the amount that the developer may charge the purchaser as a security deposit in respect of the unit shall not exceed one month's rent charged for the unit.

1978 c9 s7

Management Agreements

Management agreements

14(1) In this section, "developer's management agreement" means a management agreement that was entered into by a corporation at a time when its board was comprised of persons who were elected to the board while the majority of residential units were owned by a developer.

(2) Subject to subsection (3), a corporation may, notwithstanding anything contained in a developer's management agreement or a collateral agreement, terminate a developer's management agreement at any time after its board is comprised of persons who were elected to the board after the majority of the residential units were owned by persons other than a developer.

(3) A developer's management agreement

(a) may not be terminated under subsection (2) without cause until 2 years have elapsed from the day that the agreement was entered into, except when the agreement permits termination at an earlier date, and

(b) may only be terminated under subsection (2) on the corporation giving 60 days' written notice to the other party to the agreement of its intention to terminate the agreement,

and the corporation is not liable to the other party to the agreement by reason only of the agreement being terminated under this section.

1978 c9 s7

Redivision

Redivision of units

15(1) Any owner or owners may, with the approval of the local authority, redivide his or their units by registering a condominium plan relating to the unit or units so redivided in the manner provided by this Act for the registration of condominium plans.

(2) Except as provided in this section, the provisions of this Act relating to condominium plans apply with all necessary modifications to a redivision of units.

(3) Notwithstanding section 20, the owners of units in a condominium plan of redivision are not a corporation, but are, on the date of registration of the condominium plan of redivision, members of the corporation formed on registration of the original condominium plan.

(4) On registration of a condominium plan of redivision, units comprised in it are subject to the burden and have the benefit of any easements affecting those units in the original condominium plan that are included in the condominium plan of redivision.

(5) The schedule endorsed on a condominium plan of redivision, as required by section 6(g), shall apportion among the units the unit factor or factors for the unit or units in the original condominium plan that are included in the redivision.

(6) Before registering a proposed condominium plan of redivision, the Registrar shall amend the original condominium plan in the manner prescribed by the regulations.

(7) On registration of a condominium plan of redivision, the land comprised in it shall not be dealt with by reference to units in the original condominium plan.

RSA 1970 c62 s10

Conversions

Conversion to condominium units

16 If a building contains premises that are

(a) rented for residential purposes to a tenant who is not a party to a purchase agreement, and

(b) not included in a condominium plan,

the owner of those premises or a person acting on his behalf shall not sell or agree to sell those premises as a residential unit until the condominium plan that includes those premises is registered at a land titles office.

1978 c9 s9

Easements

Easements in favour of owner

17 After the registration of a condominium plan, there is implied in respect of each unit shown in it,

(a) in favour of the owner of the unit and as appurtenant to the unit, an easement for the subjacent and lateral support of the unit by the common property and by every other unit capable of affording support,

(b) in favour of the owner of the unit, and as appurtenant to the unit, an easement for the shelter of the unit by the common property and by every other unit capable of affording shelter, and

(c) in favour of the owner of the unit, and as appurtenant to the unit, easements for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air and other services including telephone, radio and television services through or by means of any pipes, wires, cables or ducts for the time being existing in the parcel to the extent to which those pipes, wires, cables or ducts are capable of being used in connection with the enjoyment of the unit.

RSA 1970 c62 s11

Easements against owner

18(1) After the registration of a condominium plan, there is implied in respect of each unit shown in it,

(a) as against the owner of the unit, an easement, to which the unit is subject, for the subjacent and lateral support of the common property and of every other unit capable of enjoying support,

(b) as against the owner of the unit, an easement, to which the unit is subject, to provide shelter to the common property and to every other unit capable of enjoying the shelter, and

(c) as against the owner of the unit, easements, to which the unit is subject, for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air and other services including telephone, radio and television services through or by means of any pipes, wires, cables or ducts for the time being existing within the unit, as appurtenant to the common property and also to every other unit capable of enjoying those easements.

(2) When an easement is implied by this section, the owner of any utility service who is providing his service to the parcel, or to any unit on it, is entitled to the benefit of any of those easements that

are appropriate to the proper provision of that service, but not to the exclusion of the owner of any other utility service.

RSA 1970 c62 s12

Easements or restrictions as to user without memorial

19(1) Easements or restrictions as to user implied or created by this Act or the by-laws take effect and are enforceable

(a) without any memorial or notification on that part of the register constituting titles to the dominant or servient tenements, and

(b) without any express indication of those tenements.

(2) All ancillary rights and obligations reasonably necessary to make easements effective apply in respect of easements implied by this Act, including the right of an owner of a dominant tenement to enter a servient tenement and replace, renew or restore any thing the dominant tenement is entitled to benefit from.

RSA 1970 c62 s13

Condominium Corporation

Condominium corporation

20(1) On the registration of a condominium plan, there is constituted a corporation under the name "The Owners: Condominium Plan No. . . . . " (the number to be specified being the number given to the plan on registration).

(2) A corporation consists of all those persons

(a) who are owners of units in the parcel to which the condominium plan applies, or

(b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 51 or 52.

(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and

(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

(4) The *Companies Act* does not apply to a corporation.

RSA 1970 c62 s14

Voting Rights

Voting rights

21(1) The voting rights of the owner of a unit are determined by the unit factor for his unit.

(2) When an owner's interest is subject to a registered mortgage, a power of voting conferred on an owner by this Act or the by-laws,

person and the day that the person became or ceased to be, as the case may be, a member of the board.

(3) The powers and duties of a corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the board of the corporation.

(4) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

RSA 1970 c62 s17;1978 c9 s11

Annual Meetings of the Corporation

Convening of meeting

24 When a developer registers a condominium plan, he shall within

(a) 90 days from the day that 50% of the residential units are sold, or

(b) 180 days from the day that the first residential unit is sold,

whichever is sooner, convene a meeting of the corporation at which a board shall be elected.

1978 c9 s12

Annual meeting

25(1) The board shall, once every year, convene an annual general meeting of the owners.

(2) An annual general meeting of the owners shall be convened by the board within 15 months of the conclusion of the immediately preceding annual general meeting.

1978 c9 s12

By-laws

By-laws

26(1) The by-laws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.

(2) Any by-law may be amended, repealed or replaced by a special resolution.

(3) An amendment, repeal or replacement of a by-law does not take effect until

(a) the corporation files a copy of it with the Registrar, and

(b) the Registrar has made a memorandum of the filing on the condominium plan.

(4) No by-law operates to prohibit or restrict the devolution of units

(a) if a unanimous resolution is required, may not be exercised by the owner, but is exercisable by the registered mortgagee first entitled in priority, and

(b) in other cases, is exercisable by the mortgagee first entitled in priority and may not be exercised by the owner if the mortgagee is present personally or by proxy.

(3) Subsection (2) does not apply unless the mortgagee has given written notice of his mortgage to the corporation.

(4) An owner or mortgagee, as the case may be, may exercise his right to vote personally or by proxy.

RSA 1970 c62 s15;1978 c9 s10

Voting where owner incapable

22(1) Any powers of voting conferred by this Act or the by-laws may be exercised

(a) in the case of an owner who is a minor, by the guardian of his estate or, if no guardian has been appointed, by the Public Trustee, or

(b) in the case of an owner who is for any reason unable to exercise control over his property, by the person who for the time being is authorized by law to exercise control over that property.

(2) If the Court, on application by the corporation or by an owner, is satisfied that there is no person capable, willing or reasonably available to vote in respect of a unit, the Court

(a) shall, in cases when a unanimous resolution is required by this Act, and

(b) may, in its discretion, in any other case,

appoint the Public Trustee or some other person for the purpose of exercising the powers of voting under this Act and the by-laws as the Court determines.

(3) On making an appointment under this section, the Court may make any order it considers necessary or expedient to give effect to the appointment.

RSA 1970 c62 s16;1978 c9 s31

Board of a Corporation

Board of management

23(1) A corporation shall have a board of managers that shall be constituted as provided by the by-laws of the corporation.

(2) A corporation shall, within 15 days of a person becoming or ceasing to be a member of the board, file at the land titles office a notice in the prescribed form stating the name and address of that

or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

(5) The by-laws bind the corporation and the owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the by-laws.

RSA 1970 c62 s18;1978 c9 s13

Initial by-laws

27 On the registration of a condominium plan the by-laws of the corporation are the by-laws set forth in Appendix 1.

1978 c9 s13

Previous by-laws

28 If

(a) a corporation existed on May 16, 1978, and

(b) that corporation was regulated by the by-laws set forth in Appendix 2, Schedules A and B as those by-laws existed on May 15, 1978,

that corporation shall continue to be regulated by those by-laws and for that purpose those by-laws remain in force in respect of that corporation until they are repealed or replaced.

1978 c9 s32

Enforcement of by-laws

29(1) If an owner, tenant or other person residing in a residential unit contravenes a by-law, the corporation may take proceedings under Part 4 of the *Provincial Court Act* to recover from the owner or tenant or both a penalty of not more than $200 in respect of that contravention.

(2) In an action under subsection (1), the corporation must establish to the satisfaction of the provincial judge hearing the matter that

(a) the by-law was properly enacted, and

(b) the by-law was contravened by the owner, tenant or other person residing in the residential unit.

(3) On hearing the matter, the provincial judge may

(a) give judgment against the defendant in the amount being sued for or any lesser amount as appears proper in the circumstances, or

(b) dismiss the action,

and make an award as to costs as appears proper in the circumstances.

(4) A corporation may not commence an action under this section unless it is authorized by by-law to do so.

(5) For the purposes of subsection (2)(a), a copy of a by-law that is certified by the Registrar as being a true copy of the by-law filed at the land titles office is prima facie proof

(a) of the contents of the by-law, and

(b) that the by-law was properly enacted.

(6) The commencement of an action against a person under this section does not restrict, limit or derogate from a remedy that an owner or the corporation may have against that person.

1978 c9 s14

Powers and Duties of Corporation

Control and management

30(1) A corporation is responsible for the enforcement of its by-laws and the control, management and administration of its real and personal property and the common property.

(2) Without restricting the generality of subsection (1), the duties of a corporation include the following:

(a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property;

(b) to comply with notices or orders by any local authority or public authority requiring repairs to or work to be done in respect of the parcel.

(3) A corporation may by a special resolution acquire or dispose of an interest in real property.

RSA 1970 c62 s19;1978 c9 s15

Administrative expenses

31(1) In addition to its other powers under this Act, the powers of a corporation include the following:

(a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;

(b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);

(c) to raise amounts so determined by levying contributions on the owners in proportion to the unit factors for their respective units;

(d) to recover from an owner by an action in debt any sum of money spent by the corporation

(i) pursuant to a by-law, or

(ii) as required by a local authority or other public authority,

in respect of the unit or common property that is leased to that owner under section 41.

(2) A contribution levied as provided in subsection (1) is due and payable on the passing of a resolution to that effect and in accordance with the terms of the resolution, and may be recovered by an action for debt by the corporation

(a) from the person who was the owner at the time when the resolution was passed, and

(b) from the person who was the owner at the time when the action was instituted,

both jointly and severally.

(3) A corporation shall, on the application of an owner or a person authorized in writing by him, certify

(a) the amount of any contribution determined as the contribution of the owner,

(b) the manner in which the contribution is payable,

(c) the extent to which the contribution has been paid by the owner, and

(d) the interest owing, if any, on any unpaid balance of a contribution

and, in favour of a person dealing with that owner the certificate is conclusive proof of the matters certified in it.

(4) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner but unpaid by him.

(5) On the filing of the caveat under subsection (4) the corporation has a charge against the unit equal to the unpaid contribution.

(6) A charge under subsection (5) has the same priority from the date of filing of the caveat as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

(7) The *Dower Act* and the *Exemptions Act* do not apply to proceedings under subsection (6).

(8) If a corporation has filed a caveat under this section, the corporation on the payment to it of the amount of the charge shall withdraw the caveat.

RSA 1970 c62 s20;1972 c22 s5;1978 c9 s16

Interest on outstanding accounts

32 The corporation may, if permitted to do so by by-law, charge interest on any unpaid balance of a contribution owing to it by an owner.

1978 c9 s17

Recovery of money

33 If any interest referred to in section 32 or a deposit referred to in section 44(3) is owing by an owner to a corporation, the corporation may, in addition to any rights of recovery that it has in law, recover that amount in the same manner as a contribution under section 31 and for that purpose that amount shall be considered as a contribution under section 31.

1978 c9 s17

Recovery of costs

34 If a corporation registers a caveat against the title to a unit under section 31, it may recover from the owner of the unit the cost incurred in preparing and registering the caveat and in discharging the caveat.

1978 c9 s17

Investments

35 Subject to section 30(3), a corporation may invest any funds not immediately required by it only in those investments in which a trustee may invest under the *Trustee Act*.

1978 c9 s17

Information on request

36 On the written request of an owner, purchaser or mortgagee of a unit the corporation shall, within 20 days of receiving that request, provide to the person making the request one or more of the following as requested by that person:

(a) a statement setting forth the amount of any contributions due and payable in respect of a unit;

(b) the particulars of

(i) any action commenced against the corporation and served on the corporation,

(ii) any unsatisfied judgment or order for which the corporation is liable, and

(iii) any written demand made on the corporation for an amount in excess of $5000 that, if not met, may result in an action being brought against the corporation;

(c) the particulars of or a copy of any subsisting management agreement;

(d) the particulars of or a copy of any subsisting recreational agreement;

(e) a copy of the budget, if any, of the corporation;

(f) a copy of the financial statement, if any, of the corporation;

(g) a copy of the by-laws of the corporation;

(h) a copy of any minutes of proceedings of a general meeting of the corporation or of the board.

1978 c9 s17

Documents, Specifications and Approvals

Documents required

37(1) The owner of the land at the time a condominium plan is registered shall provide to the corporation without charge not later than 180 days from the day the condominium plan is registered the original or a copy of the following documents:

(a) all warranties and guarantees on the real and personal property of the corporation and the common property for which the corporation is responsible;

(b) the

(i) structural, electrical, mechanical and architectural working drawings and specifications, and

(ii) as built drawings,

that exist for the common property for which the corporation is responsible;

(c) the plans that exist showing the location of underground utility services, sewer pipes and cable television lines located on the common property;

(d) all written agreements that the corporation is a party to;

(e) all certificates, approvals and permits issued by a local authority, the Government or an agent of the Government that relate to any property for which the corporation is responsible.

(2) A corporation may at any time before it receives a document under subsection (1) make a written request to the owner of the land referred to in subsection (1) for a copy of that document and that person shall, within 20 days of receiving that request, provide to the corporation without charge a copy of that document if the document is in the possession of that person.

1978 c9 s17

Insurance

Insurance

38(1) A corporation

(a) shall place and maintain insurance on the units, other than improvements made to the units by the owners, and the common property against loss resulting from destruction or damage caused by fire and those other perils specified in the by-laws,

(b) shall, if required to do so by by-law, place and maintain insurance on the improvements made to the units by the owners against loss resulting from destruction or damage caused by fire and those other perils specified in the by-laws, and

(c) may place and maintain insurance on the units and the common property or either of them against additional perils other than those specified in the Act or the by-laws,

and for that purpose the corporation has an insurable interest in the units and the common property.

(2) In complying with subsection (1), the corporation must place insurance that provides that if

(a) the insured property is destroyed or damaged, and

(b) that property is replaced or repaired,

no deduction shall be made from the settlement for depreciation to the property.

(3) If a corporation places insurance under subsection (1)(c), it may continue that insurance unless it is prohibited from doing so by a resolution passed at a properly convened meeting of the corporation.

(4) Any payment by an insurer under a policy of insurance for the destruction of or damage to a unit or the common property shall, notwithstanding the terms of the policy,

(a) be paid to the insurance trustee designated in the by-laws or, if the by-laws do not designate an insurance trustee, to the corporation, and

(b) be used forthwith, subject to sections 50, 51 and 52, for the repair or replacement of the insured property that was destroyed or damaged.

(5) Notwithstanding the *Insurance Act* or any policy of insurance, if insurance is placed by a corporation and an owner against the loss resulting from destruction of or damage to the units or the common property,

(a) the insurance placed by the corporation is deemed to be first loss insurance, and

(b) the insurance placed by the owner of a unit in respect of the same property that is insured by the corporation is deemed to be excess insurance.

RSA 1970 c62 s21;1972 c22 s6;1978 c9 s18

Copies of insurance policies

39 On a written request of an owner, purchaser or mortgagee of a unit the corporation shall, within 20 days of receiving that request,

provide to the person making the request copies of the policies of insurance placed by the corporation.

1978 c9 s20

Dispositions of Common Property

Disposition of common property

40(1) By a unanimous resolution a corporation may be directed to transfer or lease the common property, or any part of it.

(2) When the board is satisfied that the unanimous resolution was properly passed and that all persons having registered interests in the parcel and all other persons having interests, other than statutory interests, notified to the corporation

(a) have, in the case of either a transfer or a lease, consented in writing to the release of those interests in respect of the land comprised in the proposed transfer, or

(b) have, in the case of a lease, approved in writing of the execution of the proposed lease,

the corporation shall execute the appropriate transfer or lease.

(3) A transfer or lease executed in accordance with subsection (2) is valid and effective without execution by any person having an interest in the common property and the receipt of the corporation for the purchase money, rent, premiums or other money payable to the corporation under the terms of the transfer or lease is a sufficient discharge of and exonerates the persons taking under the transfer or the lease from any responsibility for the application of the money expressed to have been so received.

(4) The Registrar shall not register a transfer or lease authorized under this section unless it has endorsed on it or is accompanied by a certificate under the seal of the corporation stating

(a) that the unanimous resolution was properly passed,

(b) that the transfer or lease conforms with the terms of it, and

(c) that all necessary consents were given.

(5) The certificate referred to in subsection (4) is,

(a) in favour of a purchaser or lessee of the common property, or part of it, and

(b) in favour of the Registrar,

conclusive proof of the facts stated in the certificate.

(6) On the filing for registration of a transfer of common property, the Registrar

(a) shall, before issuing a certificate of title, amend the condominium plan by deleting from it the common property comprised in the transfer, and

(b) shall register the transfer by issuing to the transferee a certificate of title for the land transferred, but no notification of the transfer shall be made on any other certificate of title in the register.

(7) On the filing for registration of a lease of common property, the Registrar shall register the lease by noting it on the condominium plan in the manner prescribed by the regulations.

RSA 1970 c62 s25

Exclusive use areas

41 Notwithstanding section 40, a corporation may, if its by-laws permit it to do so, grant a lease to an owner of a residential unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property.

1978 c9 s21

Covenants benefiting parcel

42 By a unanimous resolution a corporation may be directed to accept on behalf of the owners a grant of easement or a restrictive covenant benefiting the parcel.

RSA 1970 c62 s26

Procedure for granting restrictive covenants

43(1) By a unanimous resolution a corporation may be directed to execute on behalf of the owners a grant of easement or a restrictive covenant burdening the parcel.

(2) When the board is satisfied that the unanimous resolution was properly passed and that

(a) all persons having interests in the parcel, and

(b) all other persons having interests, other than statutory interests, that have been notified to the corporation,

have consented in writing to the release of those interests in respect of the land comprised in the proposed disposition, the corporation shall execute the appropriate instrument to grant the easement or covenant.

(3) An instrument granting an easement or covenant executed in accordance with subsection (2) is valid and effective without execution by any person having an interest in the parcel, and the receipt of the corporation is a sufficient discharge of and exonerates all persons taking under the instrument from any responsibility for the application of the money expressed to have been so received.

(4) The Registrar shall not register an instrument granting an easement or covenant authorized under this section unless it has endorsed on it or is accompanied by a certificate under the seal of the corporation stating that the unanimous resolution was properly passed and that all necessary consents were given.

(5) The certificate referred to in subsection (4) is,

(a) in favour of a person dealing with the corporation under this section, and

(b) in favour of the Registrar,

conclusive proof of the facts stated in the certificate.

(6) The Registrar shall register the instrument granting the easement or covenant by noting it on the condominium plan in the manner prescribed by the regulations.

RSA 1970 c62 s27

Rental of Residential Units

Rental of residential units

44(1) An owner of a residential unit shall not rent his unit until he has given written notice to the corporation of his intention to rent the unit, setting forth

(a) the address at which he may be served with a notice given by the corporation under section 45 or an originating notice or order referred to in section 46 or 47, and

(b) the amount of rent to be charged for the unit.

(2) If an owner of a residential unit rents his unit it is a condition of that tenancy, notwithstanding anything in the tenancy agreement, that the persons residing in that unit shall not

(a) cause damage to the real or personal property of the corporation or the common property, or

(b) contravene the by-laws.

(3) The corporation may require an owner who rents his residential unit to pay to and maintain with the corporation a deposit that the corporation may use for

(a) the repair or replacement of the real and personal property of the corporation or of the common property, and

(b) the maintenance, repair or replacement of any common property that is subject to a lease granted to the owner of the unit under section 41,

that is damaged, destroyed, lost or removed, as the case may be, by a person residing in the rented unit.

(4) A deposit referred to in subsection (3) shall not exceed one month's rent charged for the unit.

(5) The owner of a residential unit shall give the corporation written

notice of the name of the tenant residing in the unit within 20 days from the commencement of the tenancy.

(6) Within 20 days of ceasing to rent his residential unit, the owner shall give the corporation written notice that his unit is no longer rented.

(7) A corporation shall, within 20 days of receiving a written notice under subsection (6),

(a) return the deposit to the owner,

(b) if the corporation has made use of the deposit for one or more of the purposes referred to under subsection (3), deliver to the owner

(i) a statement of account showing the amount used, and

(ii) the balance of the deposit not used, if any,

or

(c) if the corporation is entitled to make use of the deposit but is unable to determine the amount of the deposit that it will use, deliver to the owner an estimated statement of account showing the amount it intends to use and, within 60 days after delivering to the owner the estimated statement of account, deliver to the owner

(i) a final statement of account showing the amounts used, and

(ii) the balance of the deposit not used, if any.

1978 c9 s22

Notice to give up possession

45(1) The corporation may give a tenant renting a residential unit a notice to give up possession of that unit, if a person residing in that unit

(a) causes damage, other than normal wear and tear, to the real or personal property of the corporation or to the common property, or

(b) contravenes a by-law.

(2) When the corporation gives a tenant a notice under subsection (1),

(a) the tenant shall give up possession of the residential unit, and

(b) notwithstanding the *Landlord and Tenant Act* or anything contained in the tenancy agreement between the tenant and his landlord, the tenancy agreement terminates.

on the last day of the month immediately following the month in which the notice is served on the tenant.

(3) A notice given under subsection (1) shall be served on the tenant and his landlord.

1978 c9 s22;1979 c17 s56

Application for order to give up possession

46(1) If a tenant is given notice under section 45(1) and does not give up possession, the corporation or the landlord may apply by originating notice to the Court for an order requiring the tenant to give up possession of the residential unit.

(2) An originating notice under this section shall be served on the tenant and his landlord not less than 3 days, exclusive of holidays and Saturdays, before the day named in the notice for the hearing of the application.

(3) The application of the corporation shall be supported by an affidavit

(a) establishing service of the notice under section 45 to give up possession,

(b) stating the reasons for giving the tenant a notice to give up possession,

(c) stating the failure of the tenant to give up possession and the reasons given, if any, for that failure, and

(d) stating any other relevant facts.

(4) On hearing the application the Court may order the tenant to give up possession of the residential unit by a date specified in the order and make any other order that it considers proper in the circumstances.

(5) If the corporation is granted an order under subsection (4), it shall serve a copy of that order on the landlord.

1978 c9 s22

Application for order to give up possession

47(1) If a person residing in a residential unit that is being rented

(a) has caused or is causing excessive damage to the real or personal property of the corporation or to the common property, or

(b) is a danger to or is intimidating persons who are residing in the other residential units located on the parcel,

the corporation may, notwithstanding that the tenant renting that residential unit has or has not been given a notice to give up possession of that residential unit under section 45 or by the landlord under the tenancy agreement, apply by originating notice to the Court

for an order requiring the tenant to give up immediate possession of that residential unit.

(2) An originating notice under this section shall be served on the tenant and his landlord not less than 3 days, exclusive of holidays and Saturdays, before the day named in the notice for the hearing of the application.

(3) The application of the corporation shall be supported by an affidavit

(a) setting forth

(i) the damage to the real or personal property of the corporation or the common property, and

(ii) the nature of the danger to or intimidation of persons residing in the other residential units,

or either of them, and

(b) stating any other relevant facts.

(4) On hearing the application, the Court may make an order

(a) requiring the tenant to give up possession of the residential unit, if the Court is satisfied that

(i) a person residing in that residential unit has caused or is causing excessive damage to the real or personal property of the corporation or the common property or is a danger to or is intimidating persons residing in the other units, and

(ii) there are reasonable and probable grounds to believe that further damage may be done or that the danger or intimidation will not cease if the tenant is allowed to remain in possession of the rented unit,

and

(b) fixing the day on which the tenant is required to give up possession of the rented unit,

and make any other order that it considers proper in the circumstances.

(5) The tenancy agreement between the tenant and the landlord terminates on the day that the tenant is required to give up possession of the unit pursuant to an order made under subsection (4).

(6) The corporation shall serve a copy of an order made under subsection (4) on the landlord.

1978 c9 s22

Requirement of by-law

48(1) A corporation shall not

(a) impose or collect deposits under section 44,

(b) give notices to give up possession of residential units under section 45, or

(c) make applications to the Court under section 46 or 47,

unless it is authorized by by-law to do so.

(2) A by-law referred to in subsection (1) may be general or specific in its application.

1978 c9 s22

Administration of Corporation

Appointment of administrator

49(1) A corporation or a person having an interest in a unit may apply to the Court for appointment of an administrator.

(2) The Court may, on cause shown, appoint an administrator for an indefinite period or for a fixed period on any terms and conditions as to remuneration or otherwise that it thinks fit.

(3) The remuneration and expenses of an administrator appointed under this section are administrative expenses within the meaning of this Act.

(4) An administrator has, to the exclusion of the board and the corporation, those powers and duties of the corporation that the Court orders.

(5) An administrator may delegate any of the powers or duties so vested in him.

(6) The Court may, on the application of an administrator or a person referred to in subsection (1), remove or replace the administrator.

RSA 1970 c62 s28;1978 c9 s31

Damage to Building

Settlement scheme for damage to building

50(1) If a building is damaged but the condominium status is not terminated pursuant to section 51 or 52, an application to settle a scheme may be made to the Court by the corporation, an owner, a registered mortgagee of a unit or a vendor under an agreement for sale of a unit.

(2) On an application under this section the Court may by order settle a scheme including provisions

(a) for the reinstatement in whole or in part of the building, or

(b) for transfer of the interests of owners of units that have been wholly or partially destroyed to the other owners in proportion to their unit factors.

(3) In the exercise of its powers under subsection (2), the Court may make those orders as it considers necessary or expedient for giving effect to the scheme, including orders

(a) directing the application of insurance money received by the corporation in respect of damage to the building,

(b) directing payment of money by the corporation or by the owners or by some one or more of them,

(c) directing an amendment of the condominium plan as the Court thinks fit, so as to include in the common property any accretion to it, and

(d) imposing any terms and conditions it thinks fit.

(4) On an application to the Court under this section an insurer who has effected insurance on the building or any part of it, being insurance against destruction of units or damage to the building, has the right to appear in person or by agent or counsel.

RSA 1970 c62 s29;1974 c65 s3(2);1978 c9 s31

Termination of Condominium

Termination of condominium

51 The condominium status of a building may be terminated by a unanimous resolution.

RSA 1970 c62 s30

Application for termination of condominium

52(1) An application to terminate the condominium status of a building may be made to the Court by the corporation, an owner, a registered mortgagee of a unit or a vendor under an agreement for sale of a unit.

(2) On an application under this section, if the Court is satisfied that, having regard to the rights and interests of the owners as a whole, it is just and equitable that the condominium status of the building should be terminated, the Court may make a declaration to that effect.

(3) When a declaration has been made pursuant to subsection (2), the Court may by order impose any conditions and give any directions, including directions for the payment of money, that it thinks fit for the purpose of adjusting as between the corporation and the owners and as amongst the owners themselves the effect of the declaration.

(4) On an application to the Court under this section an insurer who has effected insurance on the building or a part of it, being insurance against destruction of units or damage to the building, has the right to appear in person or by agent or counsel.

RSA 1970 c62 s31;1974 c65 s3(3);1978 c9 s31

Effect of termination of condominium

53(1) On the condominium status of the building being terminated under section 51 or 52, the corporation shall forthwith file with the Registrar a notice of the termination in the prescribed form.

(2) On receipt of the notice referred to in subsection (1), the Registrar shall make a notification in respect of the notice on the condominium plan in the manner prescribed by the regulations and on the notification being made, the owners of the units in the plan are entitled to the parcel as tenants in common in shares proportional to the unit factors of their respective units.

RSA 1970 c62 s32;1978 c73 s7

Sale of property

54(1) When the condominium status of a building is being terminated the corporation may be directed, by a unanimous resolution, to transfer the parcel or any part of it.

(2) When the board is satisfied that the unanimous resolution was properly passed and that

(a) all persons having registered interests in the parcel, and

(b) all other persons having interests, other than statutory interests, that have been notified to the corporation,

have consented in writing to the release of the interests in respect of the land comprised in the proposed disposition, the corporation shall execute the appropriate transfer.

(3) A transfer executed pursuant to subsection (2) is valid and effective without execution by any person having an interest in the parcel and the receipt of the corporation is sufficient discharge of and exonerates the person taking under the transfer from any responsibility for the application of the money expressed to have been so received.

(4) The Registrar shall not register a transfer executed pursuant to this section

(a) unless the transfer has endorsed on it or is accompanied by a certificate under the seal of the corporation that the unanimous resolution was properly passed and that all necessary consents were given, and

(b) until the notification required by section 53 has been made on the condominium plan.

(5) A certificate made pursuant to subsection (4) is,

(a) in favour of a purchaser of the parcel, and

(b) in favour of the Registrar,

conclusive proof of the facts stated in the certificate.

(6) When land is transferred by a corporation pursuant to this section, the Registrar

(a) shall cancel the certificates of title relating to the units, and

(b) shall register the transfer and issue to the transferee a certificate of title for the land transferred,

whether or not he is in possession of the duplicate certificates of title for the units.

RSA 1970 c62 s33

Dissolution of Corporation

Dissolution of corporation

55(1) The Court on an application by a corporation, a member of the corporation, or an administrator appointed under section 49 may by order provide for the winding up of the affairs of a corporation.

(2) By the same or subsequent order the Court may declare the corporation dissolved on a date specified in the order.

RSA 1970 c62 s34;1978 c9 s31

Assessment and Taxation

Definitions

56 In this section and sections 57 to 59,

(a) "assessing Act" means an Act pursuant to which an assessing authority is empowered to assess and levy rates, charges or taxes on land or in respect of the ownership of land and includes a by-law or regulation made pursuant to that Act;

(b) "assessing authority" means a local authority, school board or other authority having power to assess and levy rates, charges or taxes on land or in respect of the ownership of land.

RSA 1970 c62 s35

Copies of condominium plan to assessing authority

57(1) A corporation shall, within 28 days after the registration of a condominium plan or an amendment to it, furnish to the assessing authority 2 copies of the condominium plan or amendment to it, including all endorsements on it, certified as prescribed by the regulations.

(2) For all purposes in relation to the making, levying, imposition, assessment or recovery of rates, charges or taxes in relation to the parcel or a part of it

(a) the particulars shown on the certified copy of the condominium plan or any amendment to it furnished pursuant to subsection (1) are conclusive proof of those particulars, and

(b) the production by an assessing authority of what purports to be a certified copy of a condominium plan or an amendment

to it furnished pursuant to subsection (1) is prima facie proof that it is the certified copy so furnished.

RSA 1970 c62 s36

Assessment and taxation

58 For the purpose of assessment and taxation by an assessing authority,

(a) each unit and the share in the common property appurtenant to it constitutes a separate parcel of land and improvements, and

(b) the common property does not constitute a separate parcel of land or improvements,

and the provisions of an assessing Act or another Act authorizing or affecting

(c) the assessment or valuation of land and improvements by an assessing authority,

(d) the imposition of rates, charges or taxes by an assessing authority in respect of land and improvements for municipal, school, hospital or other purposes authorized by law, or

(e) the collection and recovery of rates, charges or taxes by an assessing authority by proceedings against an assessed owner and his property or the land and improvements against which the rates, charges or taxes are charged,

apply with all necessary modifications to each unit and the share in the common property appurtenant to it.

RSA 1970 c62 s37

Liability of corporation

59 The corporation is not liable in relation to the parcel for any rate, charge or tax levied by an assessing authority.

RSA 1970 c62 s38

Miscellaneous

Petition to Court

60(1) Unless otherwise provided for in this Act or the regulations, an application to the Court under this Act shall be by petition.

(2) On an application, notice shall be served on the persons the Court directs.

(3) Notwithstanding subsection (2), the Court may dispense with notice.

(4) The Court may direct the trial of an issue and may give any directions as to all matters, including filing of pleadings, that appear necessary and proper for the final hearing of the application.

RSA 1970 c62 s39;1978 c9 ss23,31

Variation of order

61 The Court may from time to time vary any order made by it under this Act.

1978 c9 s24

Rights of entry

62 When a local authority, public authority or person authorized by either of them has a statutory right to enter on any part of a parcel, the authority or person is entitled to enter on any other part of the parcel to the extent necessary or expedient to enable it or him to exercise its or his statutory powers.

RSA 1970 c62 s40

Service

63(1) A document including any written notice or request may be served on a corporation

(a) by leaving it at or by sending it by registered mail

(i) if a change of address for service has not been filed under section 65(2), to the address shown on the condominium plan, or

(ii) if a change of address for service has been filed under section 65(2), to the address for service shown on the latest notice filed,

or

(b) by personal service on a member of the board.

(2) For the purposes of this section "document" includes summons, notice, tax notice, order and other legal process.

RSA 1970 c62 s42;1978 c9 s26

Service of notices

64(1) A corporation may serve on a landlord a notice given under section 45 or an originating notice or order referred to in section 46 or 47

(a) by personal service, or

(b) by registered mail sent to the address given to the corporation under section 44.

(2) A corporation may serve on a tenant a notice given under section 45 or an originating notice or order referred to in section 46 or 47

(a) by personal service, or

(b) if the tenant cannot be served personally by reason of his absence from the premises or by reason of his evading service,

(i) by giving it to an adult person who apparently resides with the tenant,

(ii) by posting it up in a conspicuous place on some part of the premises, or

(iii) by sending it by registered mail to the tenant at the address where he resides.

1978 c9 s27

Change of address for service

65(1) A corporation may by resolution of the board change its address for service.

(2) A change in the address for service under subsection (1) does not take effect until a notice of that change of address is filed in the prescribed form at the land titles office.

1978 c9 s27

Fees for documents

66 The corporation may charge a reasonable fee to compensate it for the expenses it incurs in producing and providing a document required under this Act.

1978 c9 s27

Dower Act

67 For the purposes of the *Dower Act*, one unit, together with the owner's share in the common property, constitutes a homestead.

RSA 1970 c62 s43

Exemptions Act

68 For the purposes of section 1(k) of the *Exemptions Act* a unit together with the owner's share in the common property is deemed to be a house and lot.

RSA 1970 c62 s44

Writ of execution

69 If a judgment is obtained against a corporation, a writ of execution in respect of it may be registered against the condominium plan.

RSA 1970 c62 s45

Builders' Lien Act

70 For the purposes of the *Builders' Lien Act*,

(a) if on the request of the owner of a unit

(i) work is done on or in respect of that unit, or

(ii) material is furnished to be used in that unit,

any lien that arises under that Act in consequence of it is on the estate of the owner in that unit and his share in the common property;

(b) if on the request of a corporation

(i) work is done on or in respect of the common property or a unit or both, or

(ii) material is furnished to be used in the common property or a unit or both

intended for the benefit of the common property generally, any lien that arises under that Act in consequence of it is on the estates of all the owners in all the units and the common property;

(c) if on the request of a corporation

(i) work is done on or in respect of any unit, or

(ii) material is furnished to be used in any unit,

intended for the benefit of that unit, any lien that arises under that Act in consequence of it is on the estate of the owner in that unit and his share in the common property.

RSA 1970 c62 s46

Offence and fine

71(1) A person who fails to comply with section 9(1) or (5), 10 or 16 is guilty of an offence and liable to a fine of not more that $2000.

(2) Subject to subsection (1), a person who fails to comply with this Act is guilty of an offence and liable to a fine of not more than $500.

(3) If a corporation fails to comply with this Act, each member of the board who is knowingly a party to that failure is guilty of an offence and liable to a fine of not more than $500.

RSA 1970 c62 s47;1978 c9 s28

Application of Act

72(1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 9 to 14 is void.

(2) A remedy that a purchaser of a residential unit has under this Act is in addition to any other rights or remedies that he has.

(3) A purchase agreement may be enforced by a purchaser notwithstanding that the developer failed to comply with this Act.

1978 c9 s29

Regulations

73 The Lieutenant Governor in Council may make regulations

(a) in respect of forms to be used for the purposes of this Act, including the form of certificates of title to units;

(b) respecting the manner of registering a condominium plan;

(c) prescribing the fees to be paid for any procedure or function required or permitted to be done under this Act;

(d) respecting the practice and procedure governing application to the Court under this Act;

(e) concerning all matters that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

RSA 1970 c62 s48;1978 c9 s31

APPENDIX 1

(Section 27)

BY-LAWS OF THE CORPORATION

1(1) In these by-laws,

(a) "Act" means the *Condominium Property Act;*

(b) "annual general meeting" means an annual general meeting of the corporation;

(c) "general meeting" means a general meeting of the corporation.

(2) Expressions defined in section 1 of the Act have the same meaning in these by-laws.

(3) The rights and obligations given or imposed on the corporation or the owners under these by-laws are in addition to any rights or obligations given or imposed on the corporation or the owners under the Act.

(4) If there is any conflict between these by-laws and the Act, the Act prevails.

Duties of the Owner

2 An owner

(a) shall permit the corporation and its agents, at all reasonable times on notice (except in case of emergency when no notice is required), to enter his unit for the purpose of

(i) inspecting the unit,

(ii) maintaining, repairing or replacing pipes, wires, cables and ducts existing in the unit and used or capable of being used in connection with the enjoyment of any other unit or common property,

(iii) maintaining, repairing or replacing common property, or

(iv) ensuring that the by-laws are being observed,

(b) shall forthwith

(i) carry out all work that may be required pursuant to these by-laws or as required by a local authority or other public

authority in respect of his unit, other than any work for the benefit of the building generally, and

(ii) pay all rates, taxes, charges and assessments that may be payable in respect of his unit,

(c) shall maintain his unit in a state of good repair,

(d) shall notify the corporation forthwith of

(i) any change in the ownership of the unit, or

(ii) any mortgage registered against the unit,

and

(e) shall not make structural, mechanical or electrical alterations to his unit or to the common property without the prior written consent of the board, which shall not be unreasonably withheld.

Powers of the Corporation

3 The corporation may

(a) acquire personal property to be used

(i) for the maintenance, repair or replacement of the real or personal property of the corporation or the common property, or

(ii) by owners in connection with their enjoyment of the real and personal property of the corporation or the common property,

(b) borrow money required by it in the performance of its duties or the exercise of its powers,

(c) secure the repayment of money borrowed by it and interest on that money by negotiable instrument, a mortgage of unpaid contributions (whether levied or not), or a mortgage of any property owned by it or by any combination of those means,

(d) grant a lease to an owner under section 41 of the Act,

(e) charge interest under section 32 of the Act on any contribution owing to it by an owner, and

(f) make an agreement with an owner or tenant of a unit for the provision of amenities or services by it to the unit or to the owner or tenant of the unit.

Election of the Board

4(1) The board shall consist of not less than 3 and not more than 7 individuals.

(2) Notwithstanding subsection (1), if there are not more than 2 owners, the board may consist of one or more individuals not to exceed 7 in number.

(3) An individual shall not be a member of the board unless that individual is 18 years of age or older.

Eligibility to Sit on the Board

5(1) A person does not need to be an owner in order to be elected to the board.

(2) Notwithstanding subsection (1),

(a) if a unit has more than one owner, only one owner in respect of that unit may sit on the board at one time, and

(b) an owner who has not paid to the corporation the contributions due and owing in respect of his unit is not eligible for election to the board.

Voting

6 At an election of members of the board each person entitled to vote may vote for the same number of nominees as there are vacancies to be filled on the board.

Term of Office

7(1) Subject to subsection (2), a member of the board shall be elected at an annual general meeting for a term expiring at the conclusion of the annual general meeting convened in the 2nd year following the year in which he was elected to the board.

(2) At the first general meeting convened under section 24 of the Act

(a) not more than 50% of the members of the board shall be elected for a term expiring at the conclusion of the annual general meeting convened in the year following the year in which they were elected, and

(b) the balance of the members shall be elected for a term expiring at the conclusion of the annual general meeting convened in the 2nd year following the year in which they were elected.

(3) Each member of the board shall remain in office until

(a) the office becomes vacant under section 9 of these by-laws,

(b) the member resigns,

(c) the member is removed under section 8 of these by-laws, or

(d) his term of office expires,

whichever comes first.

Removal of a Member of the Board

8 Except when the board consists of less than 3 individuals, the corporation may by resolution at a general meeting remove a member of the board before the expiration of his term of office and appoint another individual in his place to hold that office for the remainder of the term.

Vacating of the Office of a Member of the Board

9 The office of a member of the board is vacated if he

(a) becomes bankrupt under the *Bankruptcy Act* (Canada),

(b) is more than 30 days in arrears in payment of any contribution required to be made by him as an owner,

(c) is the subject of a certificate of incapacity issued under the *Dependent Adults Act*,

(d) is convicted of an indictable offence for which he is liable to imprisonment for a term of not less than 2 years,

(e) resigns his office by serving notice in writing on the corporation, or

(f) is absent from 3 consecutive meetings of the board without permission of the board and it is resolved at a subsequent meeting of the board that his office be vacated.

Vacancy

10 When a vacancy occurs on the board under section 9 of these by-laws, the board may appoint an individual to fill that office for the remainder of the former member's term.

Officers of the Corporation

11(1) At the first meeting of the members of the board held after the general meeting of the corporation at which they were elected, the board shall designate from its members a president, vice-president, secretary and treasurer of the corporation.

(2) Notwithstanding subsection (1), the board may designate one person to fill the offices of secretary and treasurer.

(3) In addition to those duties assigned to the officers by the board,

(a) the president or, in the event of his absence or disability, the vice-president,

(i) is responsible for the daily execution of the business of the corporation, and

(ii) shall act as chairman of the meetings of the board;

(b) the secretary or, in the event of his absence or disability, another member of the board designated by the board,

(i) shall record and maintain all the minutes of the board,

(ii) is responsible for all the correspondence of the corporation, and

(iii) shall carry out his duties under the direction of the president and the board;

(c) the treasurer or, in the event of his absence or disability, another member of the board designated by the board, shall

(i) receive all money paid to the corporation and deposit it as the board may direct,

(ii) properly account for the funds of the corporation and keep those books as the board directs,

(iii) present to the board when directed to do so by the board, a full detailed account of receipts and disbursements of the corporation, and

(iv) prepare for submission at the annual general meeting

(A) a budget for the forthcoming fiscal year of the corporation, and

(B) an audited statement for the most recently completed fiscal year of the corporation.

(4) A person ceases to be an officer of the corporation if he ceases to be a member of the board.

(5) If a person ceases to be an officer of the corporation, the board shall designate from its members a person to fill that office for the remainder of the term.

(6) If a board consists of not more than 3 persons, those persons

may perform the duties of the officers of the corporation in such manner as the board may direct.

Majority Vote and Quorum of the Board

12(1) At meetings of the board, all matters shall be determined by majority vote and in the event of a tie vote, the chairman is entitled to a casting vote in addition to his original vote.

(2) A quorum for a meeting of the board is a majority of the members of the board.

Written Resolutions

13 A written resolution of the board signed by all of the members of the board has the same effect as a resolution passed at a meeting of the board duly convened and held.

Seal of the Corporation

14(1) The corporation shall have a corporate seal that shall not be used except

(a) under the authority of a resolution of the board given prior to its use, and

(b) in the presence of not less than 2 members of the board who shall sign the instrument to which the seal is affixed.

(2) Notwithstanding subsection (1), if there are not more than 2 members of the corporation, one member may be authorized by the board to use the corporate seal and sign the instrument to which the seal is affixed.

Signing Authority

15 The board shall prescribe, by resolution,

(a) those officers or other persons who are authorized to sign cheques, drafts, instruments and documents not required to be signed under the corporate seal, and

(b) the manner, if any, in which those cheques, drafts, instruments or other documents are to be signed.

Powers of the Board

16(1) The board shall

(a) meet at the call of the president to conduct its business and adjourn and otherwise regulate its meetings as it thinks fit, and

(b) meet when a member of the board gives to the other members

not less than 7 days' notice of a meeting proposed by him, specifying the reason for calling the meeting.

(2) The board may employ on behalf of the corporation any agents and employees it thinks necessary to control, manage and administer the real and personal property of the corporation and the common property and in that respect may authorize those persons to exercise the powers of and carry out the duties of the corporation.

(3) The board may, subject to any restriction imposed on it or direction given to it at a general meeting of the corporation, delegate to any of its members or to other persons any or all of its powers and duties as it thinks fit, and may at any time revoke that delegation.

Duties of the Board

17 The board shall

(a) cause proper books of account to be kept in respect of all money received and expended by it and the matters in respect of which the receipt and expenditure take place;

(b) prepare financial statements relating to all money of the corporation, and the income and expenditures of the corporation, for each annual general meeting;

(c) maintain financial records of all the assets, liabilities and equity of the corporation;

(d) submit to the annual general meeting an annual report consisting of the financial statements and other information as the board may determine or as may be directed by a resolution passed at a general meeting.

Procedure

18 All meetings of the board and general meetings shall be conducted according to the rules of procedure adopted by the board.

General Meetings other than an Annual General Meeting

19 The board

(a) shall, on the written request of the owners entitled to vote and who represent not less than 15% of the total unit factors for the units, convene a general meeting, and

(b) may, whenever it considers it proper to do so, convene a general meeting.

Notice of General Meetings

20(1) When an annual general meeting or a general meeting is to be convened, the board shall, not less than 7 days prior to the day on which the meeting is to be convened, give to each owner written notice of the meeting stating

(a) the place, date and time at which the meeting is to be convened, and

(b) the nature of any special business, if any, to be brought forth at the meeting.

(2) On being notified by a mortgagee entitled to vote under section 21 of the Act that it wishes to be notified of general meetings, the board shall give to that mortgagee the same notices required to be given to the owner under subsection (1) of this section.

(3) An annual general meeting or a general meeting or anything done at that meeting is not invalid by reason only that

(a) a person, by accident, was not, in respect of that meeting, given a notice under subsection (1), or

(b) a person did not in fact receive a notice given under subsection (1) in respect of that meeting.

Quorum

21(1) Except as otherwise provided by these by-laws, no business shall be transacted at an annual general meeting or a general meeting unless a quorum of persons entitled to vote is present or represented by proxy, at the time when the meeting commences.

(2) A quorum for an annual general meeting or a general meeting consists of not less than 25% of all the persons entitled to receive notice under section 20 of these by-laws being present in person or represented by proxy at that meeting.

(3) If within 30 minutes from the time appointed for the commencement of an annual general meeting or a general meeting a quorum is not present, the meeting shall stand adjourned to the corresponding day in the next week at the same place and time and if at the adjourned meeting a quorum is not present within 30 minutes from the time appointed for the commencement of the meeting, the persons entitled to vote who are present or represented by proxy constitute a quorum for the purpose of that meeting.

22(1) The president or, in the event of his absence or disability, the vice-president or other person elected at the meeting, shall act as chairman of an annual general meeting or a general meeting.

(2) The order of business at an annual general meeting and, as far as practicable at any other general meeting, shall be as follows:

(a) call to order by the chairman;

(b) calling of the roll and certifying of proxies;

(c) proof of notice of meeting, waiver or proxies, as the case may be;

(d) reading and disposal of any unapproved minutes;

(e) reports of officers;

(f) reports of committees;

(g) election of members of the board;

(h) unfinished business;

(i) new business;

(j) adjournment.

Show of Hands

23(1) At an annual general meeting or a general meeting, a resolution shall be voted on by a show of hands unless a poll is demanded by a person entitled to vote and present in person or by proxy, and unless a poll is so demanded, a declaration by the chairman that a resolution has on the show of hands been carried is conclusive proof of the fact without proof of the number or proportion of votes recorded in favour of or against the resolution.

(2) If a person demands a poll, that person may withdraw that demand and on the demand being withdrawn the vote shall be taken by a show of hands.

Taking of Poll

24 A poll, if demanded, shall be conducted in a manner as directed by the chairman, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Tie Vote

25 In the case of a tie in a vote taken at an annual general meeting or a general meeting, whether on a show of hands or on a poll, the chairman of the meeting is entitled to a casting vote in addition to his original vote.

Number of Votes

26(1) If a vote is taken by a show of hands, each person entitled to vote has one vote.

(2) If a vote is taken by a poll, the number of votes that a person

may cast shall correspond to the unit factors for the respective units represented by that person.

Votes at an Annual General Meeting or a General Meeting

27 Except for matters requiring a special resolution or unanimous resolution, all matters shall be determined by a majority vote.

Manner of Voting

28 On a show of hands or on a poll, votes may be given either personally or by proxy.

Appointment of Proxy

29 An instrument appointing a proxy shall be in writing under the hand of the person making the appointment or his attorney, and may be either general or for a particular meeting, but a proxy need not be an owner.

Restrictions on Voting

30(1) Except as provided for in subsection (2) of this section or section 21 of the Act, there are no restrictions or limitations on an owner's rights to vote at an annual general meeting or a general meeting.

(2) If, at the time of an annual general meeting or a general meeting, an owner has not paid to the corporation all contributions that are due and owing in respect of his unit, that owner is ineligible to cast a vote at that meeting in respect of any resolution other than a special resolution or a unanimous resolution.

(3) An owner's ineligibility to cast a vote does not affect the right of the mortgagee first entitled in priority in respect of a mortgage registered against the title of that owner's unit to vote in accordance with the Act.

Vote by Co-owners

31(1) If a unit is owned by more than one person, those co-owners may vote personally or by proxy and

(a) in the case of a vote taken by a show of hands, those co-owners are entitled to one vote between them, and

(b) in the case of a vote taken by a poll, a co-owner is entitled to that portion of the vote applicable to the unit as is proportionate to his interest in the unit.

(2) A co-owner may demand that a poll be taken.

Signed Resolution — Majority Vote

32 If a resolution of the members of the corporation requires a majority vote, that resolution signed in person or by proxy by all the persons who, at a properly convened annual general meeting or general meeting, would be entitled to vote, has the same effect as a resolution duly passed at the meeting.

Capital Replacement Reserve Fund

33(1) The board shall establish and maintain a fund called a "Capital Replacement Reserve Fund" to be used for the repair or replacement of

(a) any real and personal property owned by the corporation, and

(b) the common property,

when the repair or replacement does not occur annually.

(2) The board may by resolution determine the minimum amount that may be paid from the Capital Replacement Reserve Fund in respect of a single expenditure.

Failure to Comply with By-laws

34 The board may exercise the powers provided for in section 29 of the Act.

Tenants

35 The corporation is authorized to

(a) impose and collect deposits under section 44 of the Act,

(b) give notices to give up possession of residential units under section 45 of the Act, and

(c) make applications to the Court under sections 46 and 47 of the Act.

Amendment of By-laws

36 Notwithstanding section 20 of these by-laws, if a by-law is to be amended, repealed or replaced, the persons entitled to vote shall be given written copies of the text of the proposed amendment, repeal or replacement not less than 14 days prior to the day on which the special resolution is to be voted on.

Restrictions in Use

37(1) In this section,

(a) "occupant" means a person present in a unit or in or on the real or personal property of the corporation or the common property with the permission of an owner;

(b) "owner" includes a tenant.

(2) An owner shall not

(a) use or enjoy the real or personal property of the corporation or the common property in such a manner as to unreasonably interfere with its use and enjoyment by other owners or the occupants;

(b) use his unit in a manner or for a purpose that will cause a nuisance or hazard to any other owner or occupant;

(c) use his unit for a purpose that is illegal;

(d) make undue noise in his unit or on or about real property of the corporation or the common property;

(e) keep an animal in his unit or on the real property of the corporation or the common property after a date specified in a notice given to him by the board;

(f) in the case of a residential unit, use his unit for a purpose other than for residential purposes;

(g) do anything in respect of his unit, the real or personal property of the corporation or the common property or bring or keep anything on it that will in any way increase the risk of fire or result in an increase of any insurance premiums payable by the corporation;

(h) use a toilet, sink, tub, drain or other plumbing fixture for a purpose other than that for which it is constructed;

(i) hang or place on the real property of the corporation or the common property or within a unit anything that is, in the opinion of the board, aesthetically unpleasing when viewed from outside the units;

(j) leave articles belonging to his household on the real property of the corporation or the common property when those articles are not in actual use;

(k) obstruct a sidewalk, walkway, passage, driveway or parking area other than for ingress and egress to and from his unit;

(l) use any portion of the real property of the corporation or the common property except in accordance with the by-laws.

(3) An owner shall ensure that his occupants comply with those requirements that the owner must comply with under subsection (2).

RSA 1970 c62 Sch.A,B;1974 c65 s3(4);1978 c9 s30

APPENDIX 2

(Section 28)

BY-LAWS OF A CORPORATION THAT WAS INCORPORATED BEFORE MAY 16, 1978

SCHEDULE A

1 An owner shall

(a) permit the corporation and its agents, at all reasonable times on notice (except in case of emergency when no notice is required), to enter his unit for the purpose of inspecting the unit and maintaining, repairing or renewing pipes, wires, cables and ducts for the time being existing in the unit and capable of being used in connection with the enjoyment of any other unit or common property, or for the purpose of maintaining, repairing or renewing common property, or for the purpose of ensuring that the by-laws are being observed,

(b) forthwith carry out all work that may be ordered by any municipality or public authority in respect of his unit, other than such work as may be for the benefit of the building generally, and pay all rates, taxes, charges, outgoings and assessments that may be payable in respect of his unit,

(c) repair and maintain his unit, and keep it in a state of good repair, reasonable wear and tear and damage by fire, storm, tempest or act of God excepted,

(d) use and enjoy the common property in such a manner as to not unreasonably interfere with the use and enjoyment thereof by other owners or their families or visitors,

(e) not use his unit or permit it to be used in any manner or for any purpose that will cause a nuisance or hazard to any occupier of a unit (whether an owner or not) or the family of such an occupier, and

(f) notify the corporation forthwith on any change of ownership or of any mortgage or other dealing in connection with his unit.

2 The corporation shall

(a) control, manage and administer the common property for the benefit of all owners,

(b) keep in a state of good and serviceable repair and properly maintain the fixtures and fittings (including elevators) used in connection with the common property,

(c) where practicable establish and maintain suitable lawns and gardens on the common property,

(d) maintain and repair (including renewal where reasonably necessary) pipes, wires, cables and ducts for the time being existing in the parcel and capable of being used in connection with the enjoyment of more than one unit or common property, and

(e) on the written request of an owner or registered mortgagee of a unit or a vendor under an agreement for sale of a unit, produce to the owner, mortgagee or vendor, or to any person authorized in writing by the owner, mortgagee or vendor, the policy or policies of insurance effected by the corporation, and the receipt or receipts for the last premium or premiums in respect thereof.

3 The corporation may

(a) purchase, hire or otherwise acquire personal property for use by owners in connection with their enjoyment of common property,

(b) borrow money required by it in the performance of its duties or the exercise of its powers,

(c) secure the repayment of money borrowed by it, and the payment of interest thereon, by negotiable instrument, or mortgage of unpaid contributions (whether levied or not), or mortgage of any property vested in it, or by combination of those means,

(d) invest as it may determine any money in the fund for administrative expenses,

(e) make an agreement with any owner or occupier of a unit for the provision of amenities or services by it to the unit or to the owner or occupier thereof,

(f) grant to an owner the right to exclusive use and enjoyment of common property, or special privileges in respect thereof, but any such grant shall be determinable on reasonable notice unless the corporation by unanimous resolution otherwise resolves, and

(g) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property.

4 The board shall consist of not less than 3 nor more than 7 owners and shall be elected at each annual general meeting, but where there are not more than 3 owners, the board shall consist of all owners.

5 Except where the board consists of all the owners, the corporation may by resolution at an extraordinary general meeting remove any

member of the board before the expiration of his term of office and appoint another owner in his place to hold office until the next annual general meeting.

6 Any casual vacancy on the board may be filled by the remaining members of the board.

7 Except where there is only one owner, a quorum of the board is 2 where the board consists of 4 or less members, 3 where it consists of 5 or 6 members, and 4 where it consists of 7 members.

8 At the commencement of each meeting the board shall elect a chairman for the meeting, who shall have a casting as well as an original vote, and if any chairman so elected vacates the chair during the course of a meeting the board shall choose in his stead another chairman who has the same rights of voting.

9 At meetings of the board all matters shall be determined by simple majority vote.

10 The board may

(a) meet together for the conduct of business, adjourn and otherwise regulate its meetings as it thinks fit, but it shall meet when any member gives to the other members not less than 7 days' notice of a meeting proposed by him, specifying the reason for calling the meeting,

(b) employ for and on behalf of the corporation such agents and servants as it thinks fit in connection with the control, management and administration of the common property, and the exercise and performance of the powers and duties of the corporation, and

(c) subject to any restriction imposed or direction given at a general meeting, delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke such delegation.

11 The board shall

(a) keep minutes of its proceedings,

(b) cause minutes to be kept of general meetings,

(c) cause proper books of account to be kept in respect of all sums of money received and expended by it and the matters in respect of which such receipt and expenditure take place,

(d) prepare proper accounts relating to all money of the corporation, and the income and expenditure thereof, for each annual general meeting, and

(e) on application of an owner or mortgagee, or any person

authorized in writing by him, make the books of account available for inspection at all reasonable times.

12 A general meeting of owners shall be held within 3 months after registration of the condominium plan.

13 Subsequent general meetings shall be held once in each year and not more than 15 months shall elapse between the date of one annual general meeting and that of the next.

14 All general meetings other than the annual general meeting shall be called extraordinary general meetings.

15 The board may whenever it thinks fit, and shall on a requisition in writing made by owners representing 25% of the total unit factors for the units, convene an extraordinary general meeting.

16 Seven days' notice of every general meeting specifying the place, the date and the hour of meeting and, in case of special business, the general nature of that business, shall be given to all owners and registered first mortgagees who have notified their interests to the corporation but accidental omission to give that notice to any owner or to any registered first mortgagee or non-receipt of that notice by any owner or any first mortgagee does not invalidate any proceedings at any such meeting.

17 All business shall be deemed special that is transacted at an annual general meeting with the exception of the consideration of accounts and election of members to the board, or at an extraordinary general meeting.

18 Except as otherwise provided in these by-laws, no business shall be transacted at any general meeting unless a quorum of persons entitled to vote is present at the time when the meeting proceeds to business, and 1/2 of the persons entitled to vote present in person or by proxy constitutes a quorum.

19 If within 1/2 hour from the time appointed for a general meeting a quorum is not present the meeting shall stand adjourned to the corresponding day in the next week at the same place and time and if at the adjourned meeting a quorum is not present within 1/2 hour from the time appointed for the meeting the persons entitled to vote who are present constitute a quorum.

20 At the commencement of a general meeting a chairman of the meeting shall be elected.

21 At any general meeting a resolution by the vote of the meeting shall be decided on a show of hands unless a poll is demanded by an owner present in person or by proxy, and unless a poll is so demanded a declaration by the chairman that a resolution has on the show of hands been carried is conclusive proof of the fact without proof of the number or proportion of votes recorded in favour of or

against such resolution, but a demand for a poll may be withdrawn.

22 A poll, if demanded, shall be taken in such manner as the chairman thinks fit and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

23 In the case of equality in the votes whether on a show of hands or on a poll the chairman of the meeting is entitled to a casting vote in addition to his original vote.

24 On a show of hands each owner shall have one vote; on a poll the votes of owners shall correspond with the unit factors for their respective units.

25 On a show of hands or in a poll votes may be given either personally or by proxy.

26 An instrument appointing a proxy shall be in writing under the hand of the appointer or his attorney, and may be either general or for a particular meeting, but a proxy need not be an owner.

27 Except in cases where by the *Condominium Property Act* a unanimous resolution is required, no owner is entitled to vote at any general meeting unless all contributions payable in respect of his unit have been paid.

28 Co-owners may vote by proxy jointly appointed by them, and in the absence of such a proxy are entitled to vote on a show of hands, except when the unanimous resolution of owners is required by the *Condominium Property Act*, but any one co-owner may demand a poll, and on any poll each co-owner is entitled to such part of the vote applicable to a unit as is proportionate to his interest in the unit, and the joint proxy, if any, on a poll has a vote proportionate to the interest in the unit of such of the joint owners as do not vote personally or by individual proxy.

29 Where owners are entitled to successive interests in a unit, the owner entitled to the first interest is alone entitled to vote, whether on a show of hands or a poll, and this by-law is applicable whether by the *Condominium Property Act* the unanimous resolution of owners is required or not.

30 Where an owner is a trustee he shall exercise the voting rights in respect of the unit to the exclusion of persons beneficially interested in the trust, and those persons may not vote.

31 The corporation shall have a common seal which shall at no time be used except by authority of the board previously given and in the presence of the members of the board or at least 2 members thereof who shall sign every instrument to which the seal is affixed, but where there is only one member of the corporation his signature is sufficient for the purpose of this clause.

32(1) The by-laws in Appendix 2, Schedule B of the *Condominium Property Act* may be added to, amended or repealed by special resolution of the corporation and not otherwise.

(2) A special resolution means a resolution passed at a general meeting of which at least 14 days' notice specifying the proposed special resolution has been given by owners representing a majority of not less than 3/4 of the total unit factors for all the lots, and not less than 3/4 of all the owners.

1966 c19 Sch.A

SCHEDULE B

1 An owner shall not

(a) use his unit for any purpose that may be illegal or injurious to the regulation of the building, or

(b) make undue noise in or about any unit or common property, or

(c) keep any animals on his unit or the common property after notice in that behalf from the board.

2 When the purpose for which a unit is intended to be used is shown expressly or by necessary implication or by the registered condominium plan, an owner shall not use his unit for any other purpose, or permit the unit to be so used.

1966 c19 Sch.B